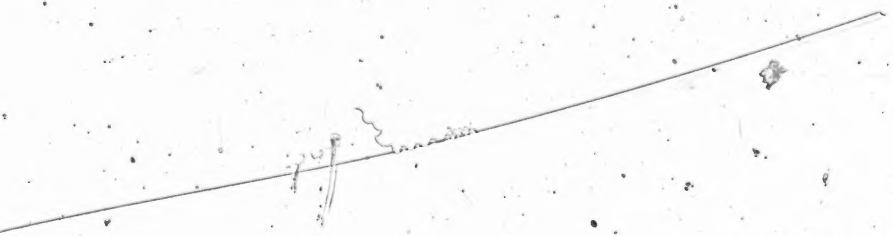

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 558.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION.

Appeal from the District Court of the United States
for the Eastern District of Virginia.

BRIEF ON BEHALF OF LEIGH R. POWELL, JR. AND HENRY W. ANDERSON, RECEIVERS OF THE PROPERTIES OF SEABOARD AIR LINE RAILWAY COMPANY.

W. R. C. COCKE,
THOMAS L. PRESTON,
CHARLES T. ABELES,
Attorneys for Receivers of Seaboard Air Line Railway Company.

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I.

OPINIONS BELOW.

The majority and dissenting opinions of the three-judge statutory court from which this appeal is taken are reported in 56 Federal Supplement 394, and are included in the printed record at pages 205 to 221. The challenged orders of the Commission are reported in

17 M. C. C. 413, 28 M. C. C. 5, and 34 M. C. C. 441, and are printed in the record at pages 81, 109 and 151, respectively.

II.

JURISDICTIONAL STATEMENT.

Appellants invoke the jurisdiction of this court to review, pursuant to U. S. C. A., Title 28, Section 47a, the final judgment of the three-judge statutory court below dismissing a suit brought under U. S. C. A., Title 28, Section 41(28) to vacate and set aside orders of the Interstate Commerce Commission granting the Receivers of Seaboard Air Line Railway Company, Intervening Defendants below and Appellees here, certificates of public convenience and necessity authorizing operations as a common carrier by motor vehicle.

III.

STATEMENT OF THE CASE.

This suit, brought pursuant to the statutes controlling such cases (U. S. C. A., Title 28, Secs. 41(28), 44, 45, 45a, 46, 47 and 48), seeks to vacate and set aside orders of the Interstate Commerce Commission granting to Legh R. Powell, Jr. and Henry W. Anderson, Receivers of the properties of Seaboard Air Line Railway Company, hereinafter referred to as the Receivers, certificates of public convenience and necessity authorizing them to engage in interstate operation as a motor carrier over fourteen different routes in the States of Virginia, North Carolina, South Carolina and

Florida. The plaintiffs below, appellants here, are American Trucking Associations, Inc., an organization formed in the interest of the highway trucking industry throughout the country, and six motor carriers operating in the territories served by the routes authorized by the challenged orders. The Receivers by intervention (U. S. C. A., Title 28, Section 45a) joined the Interstate Commerce Commission as a defendant (R. 178). The United States, as statutory defendant, confessed error and joined in the prayer of the petition (R. 172).

A clear and comprehensive statement of the issues involved requires a chronological recital of the numerout proceedings before the Commission through which the Receivers' motor carrier operating rights were obtained.

Pursuant to the requirements of Section 206 of Part II of the Interstate Commerce Act (U. S. C. A., Title 49, Sec. 306) applications for certificates were filed with the Commission at various times ranging from February 23, 1937, to August 15, 1938. In due course the Commission referred each application to a Joint Board composed of one member from each state in which the proposed operation was located (U. S. C. A., Title 49, Sec. 305(a)). At the hearings before the Joint Boards a number of motor carriers appeared as protestants, and on their behalf the Southern Motor Carriers Rate Conference, an industry organization not a party to this suit, filed motions, later followed by formal petitions to the Commission, asserting that the operations proposed in the several applications contemplated through service traversing three states, and, in conjunction with the Receivers' rail operations, involved six states, and

that the Joint Board to which the several applications had been referred were illegally constituted, and prayed that the hearings and consideration of the applications be stayed and that all of the proceedings be consolidated and referred to differently constituted Joint Boards or to an Examiner (R. 44, 45, 48). The motions and petitions were denied by the Joint Boards (R. 37) and the Commission (R. 52), the hearings were completed, and recommended reports and orders were issued by the Joint Boards.* Thereupon, by reports and orders dated July 11, 1939, (17 M. C. C. 413, R. 81), and February 17, 1940 (21 M. C. C. 773), the Commission granted the authority for all routes here involved, and thereafter formal certificates dated September 30, 1939, and April 4, 1940, were issued.

The authorities thus granted, however, were not unrestricted. The Receivers' applications had stated that the proposed operations were to be utilized for the purpose of rendering "a coordinated rail and highway service between points located on the railroads involved" and would, if authorized, "reduce the cost of rail operations to the extent that it is now necessary to operate trains for the handling of small quantities of less-than-carload freight" (R. 29). Finding that the service should be limited to that "which is strictly supplemental of, or auxiliary to, and coordinated with applicants' rail service," the Commission granted the authority subject to restrictions that limited the service by motor vehicle to that which is auxiliary to or supplemental of the Receivers' rail operations, prohibited service to any point not on their rail lines, and, as Condition 3, proscribed the transportation by motor vehicle of

*One such recommended report and order is set out as Exhibit K to the Complaint, R. 65.

any shipments which did not receive a prior or subsequent movement by rail (17 M. C. C. 413, 433, R. 81, 105).

Experience soon demonstrated that to a substantial degree the benefits anticipated by the Receivers from the auxiliary highway service were defeated by the prior or subsequent rail-haul restriction. They thereupon petitioned the Commission for rehearing and reconsideration. The proceedings, however, were reopened only for oral argument, following which the Commission issued its report and order dated January 24, 1941, in *Kansas City Southern Transport Co. Common Carrier Application*, 28 M. C. C. 5 (R. 109).* Reaffirming its previous findings that public convenience and necessity required the coordinated type of service rendered by the Receivers, and rejecting numerous objections interposed by the protesting parties, the Commission found that the prior or subsequent rail-haul restriction deprived the public of the full benefit which its interest demanded, and accordingly eliminated this condition from the certificates previously issued (R. 116). Also finding that freight trains carrying package cars of less-than-carload freight were operated in through movement between principal stations, and that truck operation in lieu of this service was not needed (R. 117), the Commission designated these stations as key points and prohibited the use of Receivers' motor vehicles for the transportation of less-than-carload shipments to, from or through more than one key point (28 M. C. C. 5, R. 109, 135). The prior or subsequent rail-haul restriction was thus replaced by the so-called key station plan for limiting

*This decision also included the Commission's report on similar petitions filed by other railroad controlled applicants.

the scope of highway service performed by the Receivers to that which was supplemental of or auxiliary to their rail operations.

As previously stated, the Receivers, in seeking relief from the rail-haul restriction, had requested that a further hearing be held for the reception of evidence, lacking in the records of the original hearings before the Joint Boards, which would enable the Commission to determine what conditions might be imposed without unduly impairing the efficacy of the coordinated service. The Commission having considered this request on oral argument only, and without the benefit of evidence essential to a proper determination of the questions presented, its selection of key stations for the Receivers' truck routes was not suitable to attain the desired purpose. Anticipating this possibility, the Commission had invited further petitions seeking changes in the locations of the key points as designated in its report and order of January 24, 1941 (28 M. C. C. 5, 11, R. 109, 118). Responding to this invitation the Receivers promptly sought a rehearing, and by order dated July 25, 1941 (R. 135), the Commission granted the request. In so doing, however, it assigned the proceedings for further hearing "solely to determine whether Condition 3 as set forth in the prior report, 28 M. C. C. 5, should be modified and, if so, the extent of such modification." (R. 136).

At this juncture the Antitrust Division of the Department of Justice, which had displayed no interest in earlier stages of the proceedings, intervened, and the appellant American Trucking Association, Inc., likewise made its first appearance, representing, *inter alia*, however, motor carriers which had been parties to

the proceedings from their inception. The grounds upon which the Antitrust Division sought to participate were stated in its petition as follows (R. 16):

> "This Division is advised that railroad companies seek through ownership and direct operation of truck lines and through operation jointly between railroads of the Railway Express Agency, to bring about a monopoly and strangulation of the independent trucking industry. This, it is contended, will result if railroads are permitted to enter the motor carrier field without restriction because the large resources of the railroads, including railroad stations, employes, soliciting forces, and their ability to cut rates and absorb losses, would give independent motor carriers little chance to survive."

Following an exhaustive hearing, and the denial of petitions by the American Trucking Associations and the Antitrust Division for a further hearing (R. 137, 142, 151), the Commission issued a report and order dated July 6, 1942, in which the various objections of the intervening protestants were fully discussed and rejected, and the key station restrictions previously imposed upon the Receivers' operation by the order of January 24, 1941, were substantially modified (34 M. C. C. 441, R. 151). This order which, together with the certificates issued pursuant thereto, is here under attack is limited by Condition 3, reading as follows (R. 159):

> "No shipments shall be transported by applicants as a common carrier by motor vehicle from Richmond to Petersburg, Va., not including shipments moving from Richmond through

Petersburg to points between Petersburg and Henderson, N. C., from Monroe to Charlotte, N. C., or from Charlotte to Monroe, not including shipments moving from or to Rutherfordton, N. C., or points between Charlotte and Rutherfordton, nor between the following points or to or through or from more than one of said points: Richmond, Va., Henderson, Raleigh, Hamlet, Monroe, and Wilmington, N. C.; Hartsville, Columbia, Garnett, and Greenwood, S. C.; and Jacksonville, Tallahassee and Tampa, Fla."

This suit was filed in the District Court of the United States for the Eastern District of Virginia on October 26, 1943. The Commission, which had been made a party defendant, and the Receivers who had been allowed to intervene as defendants (R. 178), filed answers opposing the complaint (R. 173, 179). The United States being a necessary party defendant (28 U. S. C. A., Sec. 46), the Department of Justice filed its answer confessing error and praying that the relief prayed for be granted (R. 172). Pursuant to U. S. C. A., Title 28, Sec. 47, a court of three judges was convened. On June 1, 1944, a hearing was held at which the appellants submitted the record of the proceedings before the Interstate Commerce Commission and the Receivers introduced evidence in support of their contention that the complaint should be dismissed by reason of the appellants' laches (R. 197). The court, in an opinion filed July 17, 1944, with one judge dissenting, and by judgment entered July 21, 1944, dismissed the complaint (R. 205, 216, 221).

Thereupon this appeal was taken by the plaintiffs below. The Department of Justice, which, as previously stated, had confessed error in the District

Court and thus aligned itself with the plaintiffs, has not joined in the appeal.

A proper understanding of the nature and purpose of, and the limitations upon, the highway operations involved is of the utmost importance. These operations are designed and function exclusively to supplement and improve the service of the railroad by substituting the use of trucks for so-called "peddler" rail cars in the distribution and collection of less-than-carload traffic at small stations intermediate between more important points to and from which the freight is transported in through movement by rail (R. 296, 565-8).* The volume of the local traffic is insufficient to warrant frequent train service to the intermediate points, and thus this class of traffic is often subject to delays, prejudicial to both shippers and the carrier, which cannot be eliminated by the addition of trains except at expense out of all proportion to the traffic handled (R. 390, 584).

The substituted truck service plan corrects these conditions at a minimum of cost and with a maximum of efficiency. Rail transportation continues to be utilized for the transportation to and from the principal stations. The less-than-carload shipments are transferred between cars and trucks at these stations and are not dependent upon the slow and infrequent service of local trains for movement from or to their origin or destination (R. 565-6).

The record is replete with uncontroverted evidence of the benefits derived by both shippers and the

*This and the following references to evidence descriptive of the nature and purpose of the truck service are typical of similar testimony in the record of each of the proceedings before the Commission.

carrier from this coordinated service. Deliveries of less-than-carload shipments are expedited by as much as thirty-six hours (R. 431). The schedules of local trains which continue to carry carload traffic are advanced by relieving them of the handling of the less-than-carload traffic, thus improving the service to the shippers and receivers of carload traffic (R. 579-82). Trains stops are eliminated, effecting fuel economies (R. 579) and reducing delays to through movements by improving connections with other trains (R. 582).

These and other advantages result from a service which is in every sense auxiliary to the Receivers' rail transportation. No new territory is invaded because the routes traversed parallel the rail lines throughout and only rail stations are served. The traffic handled is that which is offered to the railroad and moves at rail rates on rail bills of lading (Stipulation No. 2, R. 190). Indeed, except in rare instances, the shipper does not know whether the original or final movement is by rail or highway.* He simply looks to the railroad for handling his shipment in whichever manner provides the best service.

From this description of the truck operations here involved it is manifest that they are similar in every respect to the type of service which was considered by this Court in *Thomson* v. *United States*, 321 U. S. 19, 88 L. Ed. 326, 64 Sup. Ct. Rep. 392, and there characterized as "merely a new method of carrying on part of its [the railroad's] all-rail freight business in which it has been engaged for many years," and as having "none

*The tariff under which the highway service is provided permits the railroad to use either rail or trucks unless the shipper directs that the substituted highway service shall not be employed.

of the elements of an independent service offered on behalf of motor vehicle operators."

The Receivers' motor carrier routes, including not only those involved in this suit but others also authorized in certificates issued by the Commission, are shown on the map attached as Appendix A, on which are also shown the key stations designated by the Commission's order of July 6, 1942.

IV.

SUMMARY OF ARGUMENT.

1. The attack upon the validity of the orders of the Commission on the ground that the Joint Boards were improperly composed cannot be sustained for the following reasons:

(a) The appellants' contention that the composition of the Joint Boards does not conform to the requirements of Section 205(a) of the Motor Carrier Act rests wholly upon the assumption that it was the purpose of the Receivers to unify certain of their motor carrier operations into a continuous service involving three or more states. The record squarely contradicts this factual premise.

(b) Even though this were not the case, and there were variance between the proposals embodied in the applications and the proof of the scope of the service intended, to hold the Commission's orders void for that reason would run counter to the plain meaning of the language of the statute and surround the Commission's administration of the Motor Carrier Act with intolerable uncertainty, confusion and delay.

Moreover in the absence of fraud or deception, of which there is no scintilla of evidence, if Joint Boards have been properly constituted on the basis of the scope of the operation proposed by the application, the subsequent proceedings are valid notwithstanding that, had the application correctly reflected the scope of the service actually to be rendered, the matter might have been referred to a different Joint Board.

2. The orders are not void by reason of the Commission's failure to require compliance with Sections 217 and 220 of Part II of the Interstate Commerce Act for the following reasons:

(a) The Receivers have filed motor-carrier tariffs and maintained accounts relating to their highway operations in the manner approved by the Commission or in conformity with their understanding of the Commission's requirements. That the procedure followed in this respect is not identical with that required for motor carriers not affiliated with railroads is of no consequence, for the Motor Carrier Act confers wide latitude upon the Commission to prescribe the form and content of motor carrier tariffs and accounts, and its discretion in this respect has not been abused.

(b) The only legal prerequisites to the issuance of a motor carrier certificate by the Commission are the findings prescribed by Section 207 of the Motor Carrier Act. The administration of the provisions of Sections 217 and 220 is ancillary to and does not condition the validity of its action under Section 207. Hence certificates otherwise lawfully issued are not vitiated by failure to require compliance with those sections.

(c) Assuming, *arguendo*, the verity of the appellants' contention that the Commission has improperly failed to require the Receivers to comply with Sections 217 and 220, administrative relief is available to appellants under Sections 204(c) and 216(e) of the Motor Carrier Act. Having failed to exhaust the remedy thus provided they cannot invoke the aid of the court.

3. The appellants' contention that they were deprived of a full and fair hearing by the improper exclusion of evidence is without foundation:

(a) With respect to every subject of which the appellants complain either evidence was received, the reason it could not be furnished was satisfactorily explained, or the proffered testimony was clearly irrelevant.

(b) The only injury which the appellants claim to have resulted from the asserted exclusion of evidence is that they were unable to defend themselves against unfair and destructive competition. They have failed to particularize how they would be prejudiced or to endeavor, either before the Commission or the court below, to substantiate these charges. The Court will not, in these circumstances, presume that they have been denied a fair hearing.

(c) The Commission found, with abundant support in the record, that the Receivers' operations would have no substantial competitive impact on existing motor carriers. None of the evidence claimed to have been excluded would have controverted this finding. Hence, even had that evidence in fact been excluded, its rejection would have been non-prejudicial.

4. The appellants' position that the Commission has adopted erroneous criteria in determining applications by railroads for motor carrier certificates is without foundation. What the appellants regard as a variance in standards of proof exacted by the Commission of the Receivers on the one hand and independent motor carriers on the other is merely a controlling factual difference which has constrained the Commission to reach a conclusion with respect to public convenience and necessity unacceptable to the appellants but unassailable in law. In making this ultimate finding, however, the Commission has exacted and applied identical tests in both classes of cases.

5. The attack upon the Commission's orders on the ground that the Receivers' motor operations will tend to create monopoly in the transportation field is wholly without substance. In administering the Motor Carrier Act the Commission's task is to enforce the policies of the Interstate Commerce Act and other legislation bearing upon transportation service and facilities. Even though in executing its statutory mandates the Commission may not entirely ignore the policies of the anti-trust laws its duties in that respect are fully and properly discharged if it estimates the scope and appraises the effect of the curtailment of competition which may result from its action. That it has done so in this case is conclusively demonstrated by the record.

6. Implicit in the objectives of this suit and the theories advanced by the appellants in its support is the claim that the use of the highways for commercial transport is the exclusive prerogative of motor carriers not affiliated with railroads. Both the legislative history of the Motor Carrier Act and the broad regulatory

principles announced by the National Transportation Policy reject this view and evidence clearly and affirmatively that operation by railroads of the type of motor carrier service authorized by the Commission and performed by the Receivers was contemplated by Congress. The extent to which and the conditions upon which they should be permitted to do so is one of the complex problems which has been committed to the experienced and expert judgment of the Commission. Its discharge of this task is, under repeated decisions of this court, to be free from judicial interference when, as here, it has acted within the boundaries of its administrative discretion, and its findings and conclusions are supported by the record.

7. Regardless of the merits, the relief sought in this suit should be denied by reason of the appellants' laches. The Receivers' operating rights which are here challenged were authorized by order of the Commission dated July 11, 1939, 17 M. C. C. 413, 433, and February 17, 1940, 21 M. C. C. 773, 775. By these orders every issue involved in this litigation was framed and the appellants were at liberty to bring this suit immediately after these orders were entered. Nevertheless the complaint was not filed until October 21, 1943. In the intervening period of almost four years the Receivers, relying upon the unchallenged operating rights which they had received from the Commission, initiated their services, and so adjusted their transportation machine as to integrate them with their rail operations. These changes, essential to meet the extraordinary demands of war traffic, would have been differently made had this suit, with its threat to the legality of the Receivers' motor carrier certificates,

been brought in timely fashion. The disruption of a vital transportation service which would attend the nullification of the Receivers' operating rights would under normal conditions be fraught with public concern. In a time of national crisis the public interest, including that of the government as a large shipper of military personnel and material, is of such paramount importance as to demand the utmost dispatch in cases of this character. The appellants' delay, which has not been satisfactorily explained, should of itself persuade the court to deny the requested relief.

V.

ARGUMENT.

The attack upon the validity of the orders of the Commission on the ground that the joint boards were improperly composed cannot be sustained.

Section 205(a) of Part II of the Motor Carrier Act provides as follows:

> "The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three states, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three states, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this part with respect to such operations as to which a hearing is required or in the judgment of the Commission is desirable: Applications for certificates, * * *. The joint board to which any such matter is referred shall be composed solely of one member from each state within which the motor carrier or brokerage operations involved in such matters are or are proposed to be conducted * * *. In acting upon matters so referred, joint boards shall be vested with the same rights, duties, powers and jurisdiction as are hereinbefore vested in members or examiners of the Commission to whom a matter is referred for hearing, and the recommendation of an appropriate order thereon; * * *."

As explained in the Statement of the Case, *ante*, p. p. 2-11, the orders complained of grant to the Receivers certificates authorizing motor carrier operations over fourteen routes for each of which a separate application was filed with the Commission. Eight of the applications covering contiguous routes which compositely traverse the States of Virginia, North Carolina and South Carolina* were filed concurrently on February 23, 1937, the remainder at various times thereafter up to August 15, 1938. Each of the applications was referred to a Joint Board composed of one member from the state or states in which the route involved in the application was situated. Thus the Boards consisted of one or two members dependent upon whether or not a state line was crossed.

The appellants contend that since the contiguity of the eight routes for which applications were concurrently filed permitted operation in three states, the proceedings should have been consolidated and referred to a Joint Board consisting of one member from each of the three states, or, in the alternative, that since the operations proposed by the Receivers were auxiliary to and supplemental of their rail service they were so integrated therewith that they should have been regarded as involving the six states traversed by the rail lines of the Receivers and accordingly referred to an Examiner. This position, we submit, is wholly untenable.

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*See map, Appendix A.

I.

The uncontroverted evidence of record conclusively sustains the Commission's action in overruling the attack upon the composition of the Joint Boards.

Joint Boards to which applications for certificates of public convenience and necessity sought under Section 206 of the Motor Carrier Act (U. S. C. A., Title 49, Sec. 306) are to be referred are required by Section 205(a) to consist "solely of one member from each state within which the motor carrier * * * operations involved * * * are or are proposed to be conducted." The appellants claim that though the Receivers segmented their contiguous routes through separate applications it was their purpose to unify their highway operations into a continuous service involving three or more states, and hence the one of two member Joint Boards to which the applications were referred were erroneously composed.

The record squarely contradicts the factual premise of this contention. It demonstrates that these motor operations, designed as they are to function as substitutes for rail service in the collection and distribution of less-than-carload freight, are not intended to be, and could not effectively be, used to replace rail cars for long distance hauls. Each truck route is established in relation to a portion of the rail system lying between principal rail points at which package freight may advantageously be transferred for distribution by truck to intermediate minor stations. The object is merely to eliminate the necessity of train stops at the small intermediate points for the delivery and collection of less-than-carload freight. There is

not, and could not in reason be, any purpose to eliminate rail service for less-than-carload shipments to the principal points themselves, for rail service to such points is indispensable in any case for the handling of freight in carload lots. Thus the several routes, whether contiguous or disconnected, were by nature designed to function locally and not interdependently. And the filing of separate applications merely corresponded to the segmented nature of the service proposed.

Without undertaking to quote in its entirety the voluminous evidence in support of the foregoing, we call attention to the following general statement on the subject by W. L. Stanley, a witness for the Receivers in the hearing of the applications covering the four routes in North Carolina, Docket MC 86687, Sub Nos. 2, 4, 5 and 6. Mr. Stanley testified as follows (R. 570):

> "Q. (By Mr. Watkins): Is it not the policy of the Seaboard Air Line Railway to parallel its rail service, all of its rail service with motor carrier service?
>
> "A. It is not.
>
> "Q To what extent are you going to do it?
>
> "A. I can answer that question by telling you that up to the present time, we have studied individual geographical situations to see what we can do by coordinating rail and truck service, and that at no time have we ever considered the proposition of paralleling the entire railroad with truck service, and I might say, Mr. Watkins, that in my opinion, that will never happen.

"Q. Mr. Stanley, you have now pending before the Interstate Commerce Commission, eight applications, have you not?

"A. I believe it is seven or eight.

"Q. And those were prepared by you, were they not?

"A. I prepared the applications, yes.

"Q. And those applications in effect establish motor carrier service from Richmond, Virginia, to the South Carolina-Georgia line, and from Wilmington, North Carolina, to Rutherfordton, North Carolina, is that not true?

"A. Considering them as a whole, that is true. *Considering them in respect to their physical operation, it is not true.*

"Q. But you are unwilling to have it stipulated in any of these applications that freight not be handled between any of those points except partly by rail and partly by motor carrier?

"A. I am not willing that that be done, because I can conceive of instances, comparatively few, where it would be desirable to transfer freight from one truck service to another truck service.

"Q. And wherever it is more expeditious or economical, you will do that?

"A. I think so, yes.

"Q. Thus, under these unlimited certificates, it would be possible to handle shipments from Richmond, Virginia, to Columbia, South Carolina, entirely by truck?

"A. It would be possible, but hardly conceivable.

"Q. And it would be possible to handle shipments between Richmond, Henderson, Raleigh, Wilmington, Hamlet, Monroe, Charlotte, Columbia, Rutherfordton, and Shelby?

"A. In some instances it would be physically possible to do that, but the reason that that would not be adopted as a practice, is the fact that there is no form of transportation of which I have knowledge that is as cheap as rail transportation, provided you have the amount of business that will justify the operation of rail service. *To go one step further, we would be perfectly foolish to handle a shipment by truck from Richmond, Virginia, to Columbia, South Carolina, when we have a car moving in a through tonnage train between those points daily.*" (Italics supplied.)

Mr. Rogers, another witness for the Receivers, testified with respect to the Monroe-Rutherfordton route as follows (R. 383):

"Q. Mr. Rogers, you operate a truck service between Hamlet and Monroe, do you not?

"A. That is correct.

"Q. Will you give us the schedules of that operation?

"A. It leaves Hamlet at 6:45 A.M., arrives at Monroe at 9:40 A.M., and return trip, leaves Monroe at 10:30 A.M., arrives at Hamlet at 2:00 P.M.

"Q. In scheduling your Monroe-Rutherfordton service, Mr. Rogers, has there been any effort or purpose in so arranging that schedule as to hook up with your Hamlet-Monroe service?

"A. You mean the Hamlet-Monroe truck service?

"Q. Yes, your Hamlet-Monroe truck service.

"A. *There has been no effort made to make a hook-up of that kind and there is none contemplated.*

"Q. *Are your schedules such as to make it possible to carry through shipments by truck with reasonable expedition between points intermediate between Rutherfordton and Monroe on the one hand, and points intermediate between Monroe and Hamlet on the other?*

"A. *No, sir. There would be more delay than would be the case with a coordinated truck-rail service, and that is a service that we would perform.*

"Q. *You would make no effort then, I understand, to establish a through truck service between Rutherfordton on the west and Hamlet on the east?*

"A. *No, sir. There would be no occasion for it.*" (Italics supplied.)

Again, in the testimony relating to the route between Hamlet and Columbia, Docket MC 86687, Sub No. 3, the following appears (R. 270):

"Q. (By Mr. Abeles). Mr. Rogers, Mr. Watkins, in his cross examination, attempted to develop the view that through the various truck services which we are proposing to establish we intend to set up a system of through truck transportation, in purpose and effect, that would compete with existing highway carrier agencies. He brought out, for example, the fact that we are now seeking to establish truck service between Wilmington and Hamlet and that we thus should be in position to carry traffic on trucks all the way from Wilmington to Columbia. I should like you to state your views on that assumption that Mr. Watkins made.

"A. Such a movement would be possible but would be simply incidental and to a con-

siderable extent improbable. We do not contemplate the elimination of any existing package cars. We have package cars out of Columbia into Hamlet, out of Hamlet into Columbia, out of Hamlet into Wilmington, out of Wilmington into Hamlet. The volume of that business is such that it would not be profitable for us to undertake to handle it by truck—the larger part of it, because it would necessitate so many trucks that the truck expense for that volume would be out of reason as compared with the cost of the train movement. In other words, where the volume is present the economical move is by train service.

"Q. In other words, as I understand what you have just said, if we have train service available between, for example, Wilmington and Columbia, we shall use the train service in preference to the truck service in the absence of some other reason for using the trucks. Is that correct?

"A. That is correct. That is just ordinary good railroading. At the present time we make cars at Hamlet, for instance, for Cheraw, McBee and Columbia. Our night trains have carload movement to and from those points every night. The volume of the LCL freight going to those three towns justifies the set-out car, and consequently that is the economical thing to do, and that is what we would continue to do. *The points we are specifically trying to serve are the smaller intermediate points, where the train would normally have to make a separate stop for the simple purpose of having to handle a very small volume of LCL freight.*" (Italics supplied.)

The foregoing excerpts from the testimony in these three hearings are characteristic of similar descriptions

of the nature and scope of all of the proposed services.* They prove beyond dispute that, as stated, the essential function of each of the respective routes is independent and self-contained. and furnish a conclusive answer to the persistent claim of the appellants that the contiguous segments are to be integrated and their operations unified.

Possibly the appellants will refer to the statements of the Receivers' witnesses that occasionally shipments may be transported by truck from a point on one route to a station on an adjacent route, and to the refusal of the Receivers to accept a restriction which would prohibit such handling. It was explained that in exceptional instances it might be desirable, when otherwise inordinate delay would occur, to carry a shipment by truck between points on contiguous routes, but that these instances would be rare and would comprise not more than 5% of the tonnage moving by highway (Hamlet-Columbia, Sub 3, R. 271, 277). The reason for this infrequent practice is evident. There is a small flow of traffic between the local stations intermediate between the truck termini which, when offered, the Receivers must accept and handle. If, for example, a shipment from LaCrosse, Va., on the Richmond-Henderson route, to Franklinton, N. C., on the Henderson-Raleigh route, was offered, and the intervention of Henderson as a truck route terminus prohibited the use of the truck service beyond that station, a peddler freight car would have to be operated from Henderson to destination, a distance of only 15½ miles, for the sole purpose of handling that single

*Other examples are: Henderson-Raleigh, Sub 2, R. 535, 536; Hamlet-Wilmington, Sub 5, R. 600, 604, 605; Raleigh-Hamlet, Sub 4, R. 614, Richmond-Henderson, Sub 7, R. 477, 478, 483, 495, 500.

shipment, perhaps a small package. Since one of the principal benefits to be derived from the auxiliary truck operation is the elimination of the use of such cars, it is obvious that an arbitrary prohibition against crossing truck termini through interchange between trucks would to a substantial degree impair the efficacy of the service.

As previously explained, however, use of the trucks for this inter-route service is rare and exceptional, and does not alter the dominant function of each segment to serve the local territory between the respective termini. The evidence to this effect was before the Commission before it disposed of the appellants' motions to consolidate the proceedings and refer them to differently constituted Joint Boards. The Commission was therefore able, as the court below has said (R. 210), to determine, independently of other reasons, whether the proposed services were of such scope and nature as to constitute local or through operations, and this Court will not substitute its judgment for that of the Commission in a field which has been committed to the discretionary authority of the administrative tribunal.

Finally, it should be observed that, while, as the record shows, there can be no doubt that the Receivers neither conceived nor intended their motor carrier operations as a vehicle for long-distance unified service, had their purpose been otherwise it was thwarted by the restrictions with which the Commission has surrounded its authority. The key stations imposed by the Commission's order in 34 M. C. C. 441, R. 151, sharply delimit the areas in which the Receivers' trucks may be used by providing that no shipments

shall be transported between or to or through or from more than one of the named key points.* Reference to Appendix A will illustrate the extent to which the scope of the service on each route is thus curtailed. Henderson, N. C., and Raleigh, N. C., are the termini of one of the truck routes. Both have been named as key stations. The restriction precludes the highway movement of a shipment from Henderson, or a point north thereof, to Raleigh or any station south of Raleigh. Similar restrictions affect the permissible service on each of the contiguous truck routes. With the Receivers' discretion thus restrained it cannot be seriously maintained that the asserted unification of services, which necessarily underlies the attack on the composition of the Joint Boards, is more than a figment of the appellants' imagination.

2.

The appellants' construction of Section 205 is in conflict with the plain meaning of the language used and is defeated by compelling practical considerations.

While the challenge of the Commission's orders on the basis of the composition of the Joint Boards is, as we have seen, refuted by the record, if we accept the appellants' factual averments at their face value and assume that there is a substantial variance between the proposals embodied in the applications and the proof of the service intended, there is still no merit in the appellants' contention that to carry the applications to a conclusion on the records made before the Joint Boards as constituted infected the entire proceedings, including the orders issued therein, with illegality. The

Ante, pp. 7, 8, R. 159.

appellants' position in this respect had been urged before the Commission from the beginning, and reiterated at every stage through which the cases progressed to final decision.* In response to this emphasis, and prompted also, no doubt, by the novelty of the question, the Commission disposed of it adversely to the appellants only after studious consideration and discussion. Its conclusions were based first on an examination and interpretation of Section 205(a), at that time 205(b), of the Motor Carrier Act, and second on the uncertainty and complexity which would attend the administration of the Motor Carrier Act if the protestants' theory were sustained.

With respect to the interpretation of these provisions the Commission said (17 M. C. C. 413; R. 85):

> "The particular provisions of the act upon which protestants rely are contained in Section 205(b) and so far as here pertinent read as follows:
>
> " 'The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three states * * * refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this part with respect to such operations: Applications for certificates, permits or licenses * * * The joint board to which any such matter is referred shall be composed solely of one member from each state within which the motor carrier or brokerage operations involved in such matter are or are proposed to be conducted.'

Ante, pp. 3, 4.

"It will be noted that the words 'such matter' are in the singular, and clearly relate back to the preceding language, 'any of the following matters arising in the administration of this part with respect to such operations.' Thus understood, it seems beyond argument that it relates to any one of the matters mentioned, rather than to a number of them, and hence refers to an individual application. In other words, the language, 'motor carrier or brokerage operations involved in such matter' clearly means 'motor carrier or brokerage operations involved in such application.' If such application covers an operation confined within the boundaries of a single state, it is obviously the 'matter' which we are required to refer to a joint board composed solely of one member from that state."

The practical administrative difficulties which the appellants' position would entail were explained as follows (17 M. C. C. 416, R. 86):

"It is true, as protestants point out, that a possible result of granting the applications included in the title proceeding and in sub numbers 1 to 8, which include routes between Richmond and Columbia, would be a unified service in three states, and that applicants may have intended such result when the several applications were filed. However, it is manifestly impossible to predict accurately such a result when applications for certificates or permits are filed with us, or to determine the existence of such an intent on the part of the party filing the applications. In the majority of cases such a result would become apparent only upon hearing the applications. On the other hand, the hearing or hearings might disclose that a unified

operation was not contemplated, even though the same party filed a number of applications covering operations in adjoining states. In the latter event, if we had assigned the applications before a two-member or three-member board, as the case might be, in advance of any certain knowledge that a unified operation in more than one state was contemplated, we should be under the necessity of reassigning the applications before the proper joint boards."

This conclusion is clearly sound. If the Commission, because of variance between the initial proposals and the proof, and quite without reference to any element of misrepresentation, must discard its original assignment and resort to new Joint Boards or an Examiner, what assurance has it that the hearing *de novo* would not develop further discrepancies between application and proof which would again require a new start? The embarrassment and delay to which the Commission might be subjected in carrying out its administrative duties if the appellants' contention is sustained are thus self-evident.

In addition to the reasons assigned by the Commission for its construction of Section 205(b) (now Section 205(a)) it should be noted that the Act provides that the personnel of the Joint Boards shall consist "of one member from each state within which the motor carrier operations * * * are proposed to be conducted." In the absence of persuasive considerations to the contrary this language must be taken in its literal sense. The *operations* proposed are those for which authority is sought in the application. Had the Congress intended, as the appellants' contention here necessarily implies, that the criterion of the composition

of the Boards be the full scope of the *service* made *physically possible* by the proposed operation, regardless of the more limited purpose disclosed by the application, it would have so indicated by appropriate and unambiguous language. Lacking such plainly expressed intent, and in the absence of fraud or deceit designed to mislead the Commission in the performance of its administrative duties (a subject later discussed), the Commission is entitled, and indeed for the compelling practical reasons explained in its decision above quoted is constrained, to rely upon the territorial scope of the operations designated in the application in forming the Joint Board to which the proceeding is referred. *Carolina Scenic Coach Lines* v. *United States*, 56 Fed. Supp. 801, 802.*

The principle thus established has been consistently followed by the Commission in later cases. In *Atlantic Coast Line Railroad Company Extension of Operation*, 30 M. C. C. 490, 491-2, *West Coast Bus Lines Common Carrier Application*, 32 M. C. C. 619, 621-22, and *Argo and Collier Truck Lines Common Carrier Application*, 27 M. C. C. 563, 566, protestants attacked the composition of the Joint Boards on much the same grounds as the appellants advanced here, and the Commission reaffirmed the ruling applied in the Receivers' cases in 17 M. C. C. 413, 416. Moreover, appellant motor carriers themselves have from time to time applied to the Commission for certificates authorizing operations over routes lying wholly within a single state but which connected, and were to be used in conjunction, with their already established lines traversing two or more states. In these instances the

*Affirmed, — U. S. —, 89 L. Ed. 235, 65 Sup. Ct. Rep. 277.

applications were referred, without protest from the appellants, to a Joint Board of which the sole member was a representative from the single state in which the extension was located. (Stipulation No. 4, R. 195).

Thus the interpretation of Section 205(a) applied in the instant cases, and accepted without protest by the appellants in seeking their own certificates, has become firmly entrenched in the Commission's administration of the Motor Carrier Act. As such it is entitled to the high respect which by established principles courts accord to the construction placed upon legislation by the tribunal to which its administration is delegated. A recent decision affirming this doctrine is *United States* v. *American Trucking Associations*, 310 U. S. 534, 84 L. Ed. 1355, 60 Sup. Ct. Rep. 1059. In that case an interpretation of the Motor Carrier Act, although a different section* from that here under consideration, was also involved, and the decision is therefore particularly apt. The Court said (310 U. S. 549, 84 L. Ed. 1354, 60 Sup. Ct. Rep. 1067):

> "The Commission and the Wage and Hour Division, as we have said, have both interpreted Section 204(a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress."

*Section 204(a).

It is clear that as to purely procedural requirements the interpretation of the body charged with administration under the statute should carry all but controlling weight. And when, as here, property rights have arisen under the departmental construction the rule calls for rigid enforcement. *Chicago & A. R. Co.* v. *United States*, 49 Ct. Cl. 463, aff'd 242 U. S. 621, 61 L. Ed. 533, 37 Sup. Ct. Rep. 241.

Two federal courts have recently considered whether grants of motor carrier certificates are invalid by reason of alleged defects in the composition of the Joint Board to which the application was referred, and in each instance have refused to sustain attacks on grounds similar to those advanced here. In *North Coast Transportation Co., et al.* v. *United States*, (1944) 54 Fed. Supp. 448, the plaintiffs sought to set aside an order of the Commission granting to a competing motor carrier a certificate to operate, among other routes, between Portland, Oregon, and Seattle, Washington. The application to the Commission included requests for operating rights in Arizona, California, Oregon and Washington, and, involving four states, was referred to an Examiner. At the hearing no evidence relating to the proposed Arizona service was offered and the request for authority in this respect was virtually abandoned. Thereupon the plaintiffs moved to refer the application to a Joint Board consisting of one member from each of the three remaining states. The Commission's refusal to grant this motion was claimed to invalidate the order granting the certificate.

In overruling this contention the Court said:

"The question is, where an application proposing operations in more than three states is assigned to an Examiner, and the proof offered by applicant substantially relates to only three states, is it then mandatory that the proceeding be reasssigned to a Joint Board? We think the statute cannot be so interpreted. 'Applications for certificates' are included in the 'matters' to be referred to a Joint Board. In making the reference, the operation proposed by the applicant must necessarily be determined from the application rather than from the supporting evidence. In disposing of plaintiffs' contention Division 5 of the Commission said (32 M. C. C. 621): 'In the absence of any showing of any intentional deception or fraud, an application, once lawfully referred either to an Examiner or to a Joint Board of either three or two members, may properly be disposed of by such referee, even though during the course of the hearing applicant wholly fails to support or otherwise abandons his proposal as to one or more states, so that the number actually finally involved is less than originally appeared. Any other conclusion would tend to uncertainty and confusion. In innumerable hearings, jurisdictional issues, requiring final determination before proceeding, would arise as to whether or not there had been a failure of proof as to a particular state.' The views of Division 5 were adopted by the full Commission. (41 M. C. C., p. 270).

"There is no evidence of fraud or deception on the part of West Coast, and plaintiffs stated at the hearing that they made no claim of bad faith. We think the action of the Commission in refusing to reassign the proceeding to a Joint Board was proper."

In a recent decision by the District Court for the Southern District of New York in *Crichton* v. *United States*, 56 Fed. Supp. 876, the court, on facts similar to those of the *North Coast Transportation Company* case, followed the decision of the California District Court, saying (p. 879):

> "Plaintiffs urge at the outset that the order of the Commission is void, since the Section 207(a) application involved operations in 'not more than thee states', and hence that reference for hearing before a joint board, rather than an examiner, was mandatory under Section 205(a). But the original application of July 16, 1938, covered operations between Nashville and New York, well in excess of three states; and in the absence of direct evidence of fraud or deception, the Commission should not be obliged to go beyond the face of the application in determining whether or not reference to a joint board is mandatory. Any other rule would be the source of endless confusion and needless circuity of action. See West Coast Bus Lines, Ltd., Common Carrier Application, 32 M. C. C. 619, 621-622, approved as to this issue by the full Commission, 41 M. C. C. 269, 270, and thereafter by a statutory court in *North Coast Transportation Co.* v. *United States*, D. C. N. D. Cal., 54 F. Sup. 448, 450, 451."

Both of these decisions were appealed to and affirmed by this Court.* In the *North Coast Transportation Company* case the appellants filed a motion for rehearing which was denied.** That in taking this

*The *North Coast Transportation Co.* case, — U. S. —, 65 Sup. Ct. Rep. 62, 89 L. Ed. 29. The *Crichton* case, — U. S. —, 65 Sup. Ct. Rep. 559, 89 L. Ed. 476.

**— U. S. —, 65 Sup. Ct. Rep. 114, 89 L. Ed. 69.

action the decision of the lower court on both the procedural and substantive issues involved was approved is evidenced by the reply to the motion to affirm in which one of the grounds vigorously advanced by the appellants in opposing the motion was the asserted error of the lower court in its ruling on the Joint Board issue.* Thus, in the absence of fraud and deception, this Court has specifically rejected the position of the appellants here with respect to the composition of the Joint Boards. How tenuous are the charges that the Receivers misled the Commission appears from the discussion that immediately follows.

3.

No element of fraud or deception is present.

The Commission's report reviewed in the *North Coast Transportation Company* case, *supra*, and the decision of the court sustaining the Commission's order suggest that the result might possibly have been different had the applicants before the Commission been guilty of fraud or deception. The Complaint in the instant case (Section III, R. 4) alleges, among other things:

> "The repetition of applications for rights disclosed a substantial program for the conduct of highway operations generally paralleling the railway system and involving several states, *and that the separate applications had the effect of concealing the true nature of the applications and of evading the statutory requirements for a hearing.*" (Italics supplied.)

*Pp. 37-41 of Appellants' Reply to Motions to Affirm in Appeal from Second Final Decree.

The innuendo in the italicized language that the filing of separate applications by the Receivers was designed to mislead the Commission, and the explicit assertion that their course of action had the effect of so doing, both of which the Receivers unequivocally deny, compel us to meet these contentions, tenuous though they be.

It should be observed at the outset that the averments alleging that the tactics of the Receivers were misleading and evasive are, when read with their context, inconsistent and self-contradictory. The second paragraph of Section III of the Complaint (R. 4) states that "the numerous separate applications of the railway for certificates of public convenience and necessity * * * constitute in fact and substance one application for integrated operating rights." The third paragraph, quoted above, asserts in the opening clause that the applications "disclosed a substantial program for the conduct of highway operations generally paralleling the railway system" and immediately follows this with the accusation that "the separate applications had the effect of concealing the true nature of the applications and of evading the statutory requirements for a hearing." In the following paragraph, *per contra*, it is stated that "the extent and scope of the proposed operations were disclosed to the Commission through numerous applications." (R. 4). In one breath the appellants charge the Receivers with concealing their intent and purpose from the Commission and in the next they claim that the very same acts *fully disclosed* to the Commission what the Receivers had in mind. The inconsistency of these two positions defies reconciliation and leaves the Complaint obscure, uncertain and self-contradictory.

If the Complaint in this particular has any meaning we assume it must intend to charge that, although proposing in fact to establish an integrated motor carrier operation over the routes which were physically connected, in which event the proceedings should have been referred to a three member Joint Board or an Examiner, the Receivers, by filing separate applications for each route, misled the Commission into the belief that they should be considered as separate, non-unified projects, and that as a consequence the Commission mistakenly referred the applications to Joint Boards consisting of one or two members, as the case might be.

The history of the proceedings in which the Receivers' certificates were obtained is in itself a conclusive answer to this charge. The contiguous routes comprise those for which authority was sought in the eight applications first and concurrently filed (17 M. C. C. 413, R. 81). Although the testimony supporting the several applications was received in separate hearings, it disclosed fully the purpose for which the proposed operations were designed and the manner in which they were to be conducted. (*Ante*, pp. 20 to 24). Before rendering its decision in a consolidated report, the Commission had before it the evidence in all of the cases, or, in its own language, "we now have the entire situation presented by the several applications before us in all of its aspects, following full and complete hearings" (17 M. C. C. 417, R. 86). It also had under consideration the appellants' motions requesting consolidation (R. 45, 46) which asserted that the Receivers were "attempting to establish a through and complete motor carrier operation from Richmond, Va.,

on the north, to the Georgia-South Carolina line on the south, and from Wilmington on the east to Rutherfordton on the west * * *." The denial of this motion, made in the light of the full record in all of the proceedings, is conclusive that the Commission was fully apprised of the nature and scope of the proposed operations, and, as the court below found (R. 213), is a complete negation of the invidious purpose with which the Receivers are charged.

The orders are not void by Reason of the Commission's failure to require compliance with Sections 217 and 220 of the Interstate Commerce Act.

Sections XII and XIII of the Complaint (R. 20) claim that the Commission arbitrarily and capriciously failed and refused to require the Receivers to comply with the provisions of Sections 217 and 220 of Part II of the Interstate Commerce Act, and, by setting up standards for the filing and publication by the Receivers of motor carrier tariffs and for the maintenance of their accounts different from those established for the appellants, subjected the latter to unfair, unreasonable and discriminatory competition. These averments present parallel questions and will therefore be discussed together.

Section 217(a), containing the provisions here relevant, provides:

> "Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of pas-

sengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in the terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful."

The material portion of Section 220(d) provides:

"The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by motor carriers, brokers, and lessors, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys; and it shall be unlawful for such carriers, brokers, and lessors to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the Commission with respect thereto."

It should first be observed that the tariffs required by Section 217(a) "shall be published * * * in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe," and that the accounts to be maintained in accordance with Section 220(d) shall be those which "the Commission

may, in its discretion, prescribe." It is thus manifest that the Congress conferred upon the Commission wide latitude in prescribing the form and content of motor carrier tariffs and accounts and virtually complete discretion in this field of regulation. Therefore, unless it has obviously failed in its duty in these respects the appellants have no tenable cause for complaint.

The record establishes that the Receivers file motor carrier tariffs and maintain accounts relating to their highway operations. Stipulation No. 2 filed by the parties (R. 190) shows that the Receivers have extended to their motor operations the same rates as are applied to their rail service, and that this action has been evidenced by motor carrier tariffs* published in the form and manner which they deem to be in full compliance with the requirements of the Commission promulgated in a report in the proceeding known as *Ex Parte* 129, 232 I. C. C. 683, wherein the Commission considered and decided the method to be followed by the Receivers and other railroads in publishing tariffs covering the auxiliary type of motor carrier service which they provide. In Stipulation No. 3 (R. 191) the parties agree that, with respect to the procedure to be followed in accounting for their motor carrier operations, the Receivers have been authorized by the Commission to include, and have included, in their reports covering their rail operations the revenues and expenses of their motor service.

Thus the Commission has specifically exercised its

*The assertion in appellants' brief (p. 105) that the Railway "does not publish a motor carrier tariff" is erroneous. The Directory referred to in Stipulation No. 2 is filed with and accepted by the Commission as a motor carrier tariff.

functions under Sections 217 and 220, and directed or authorized the manner in which the Receivers shall comply with the provisions of those Sections. That the procedure prescribed is not identical with that adopted for motor carriers unaffiliated with railroads does not invalidate the requirements. The discretion which, as shown, has been vested in the Commission plainly leaves room for adapting the measures used in administering Sections 217 and 220 to the varying needs and circumstances that may arise. The Commission having determined that the tariff and accounting regulations for the auxiliary motor carrier service of railroads need not conform in all respects to the requirements for independent motor carriers, its decision cannot be questioned unless resultant violations of other provisions of the Interstate Commerce Act, which are absent here, be shown.

Moreover, even if we assume, *arguendo*, that the allegations of Sections XII and XIII of the Complaint are true, the orders granting the certificates are not for that reason void. Enforcement by the Commission of the provisions of Sections 217 and 220 is not an essential prerequisite of the granting of certificates pursuant to Section 207. The certificate shall issue

> "if it is found that the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity."

If these findings are made and supported by the record the appellant is entitled to a certificate. The administration by the Commission of the provisions of Sections 217 and 220 is merely ancillary to and does not condition the validity of its action under Section 207. If it is derelict in its duty to enforce the former sections an injured party may have relief in an appropriate proceeding directed to that end, but cannot make such a proceeding the vehicle of an attack upon the certificate itself.

Finally, again assuming for argument that the allegations of Sections XII and XIII of the Complaint are true, the contention that the orders here challenged are therefore void cannot be sustained for a further and equally conclusive reason. If as a result of the Receivers' failure to comply with the requirements of the provisions of the Act relating to tariffs and accounting the appellants are subjected, as the Complaint avers, "to unfair, unreasonable and discriminatory competition," the statute furnishes their remedy. Sections 204(c) and 216(e) provide:

> "Section 204(c). Upon complaint in writing to the Commission by any person, * * * organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier * * * has failed to comply with any provision of this Part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier * * * has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier * * * to comply therewith."

> "Section 216(e). Any person, State Board, organization, or body politic may make complaint in writing that any * * * practice, in effect or proposed to be put into effect, is or will be in violation of this section of or Section 217. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any * * * practice * * * whatsoever of such carrier or carriers affecting such rate, fare of charge * * * is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential, it shall determine * * * the lawful * * * practice thereafter to be made effective * * *."

Violations of Sections 217 and 220 are manifestly a proper subject of complaint and investigation under either or both of these sections. The avenue of administrative relief thus provided must be pursued and exhausted before the appellants can invoke judicial aid.

This principle, the so-called "primary jurisdiction" rule, is so firmly imbedded in the law governing the procedure for the enforcement of, or relief from violations of, the Interstate Commerce Act, and indeed of the large and growing field of administrative statutes, that extensive treatment is not warranted. The leading case is *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. Rep. 350, where a shipper sought to recover from a railroad freight charges claimed to have been unreasonable, discriminatory and otherwise in violation of the Act. The Court held that the action would not lie unless and until the shipper had sought redress from the Commission which had the exclusive power, in the first instance, to deter-

mine the reasonableness and propriety of the rate. An exhaustive exposition of the reasons underlying this conclusion is summarized in the following language from the opinion (204 U. S. 440, 41 L. Ed. 559, 27 Sup. Ct. Rep. 355):

> "For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commissiion, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirements as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the

> alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

The doctrine thus enunciated has been uniformly adhered to in later decisions. *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156, 67 L. Ed. 183, 43 Sup. Ct. Rep. 47; *Robinson* v. *B. & O. R. R. Co.*, 222 U. S. 506, 56 L. Ed. 288, 32 Sup. Ct. Rep. 114; *Midland Valley R. R. Co.* v. *Barkley*, 276 U. S. 482, 72 L. Ed. 664, 48 Sup. Ct. Rep. 342. It is unquestionably controlling here. Accordingly, for this as well as the other reasons above set forth, the order may not be set aside for alleged violations of Sections 217 and 220.

The appellants were not deprived of a full and fair hearing by the wrongful exclusion of evidence.

We turn now to the averments that evidence offered at the hearings before the Joint Boards and the Examiner was improperly excluded. Section VIII of the Complaint (R. 12) enumerates thirteen subjects which the Joint Boards are said to have refused to consider,* and Section XI (R. 16) lists twelve subjects (in large part the same) claimed to have been excluded by the Examiner at the consolidated hearing,** by reason of which the appellants allege that "they were unable to defend themselves against unnecessary, unfair and destructive competition and undue restraint of competition, and were denied a fair and reasonable hearing." (R. 13).

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* 1. The complete cost of the proposed truck operations.
2. The tonnage to be handled by truck.
3. The revenues to be derived from the truck operations.
4. The segregation of rail and motor expenses and revenues.
5. The economic effect on existing motor carriers.
6. The willingness and ability of existing motor carriers to perform the service.
7. Destructive competition flowing from subsidized truck operations.
8. The refusal of the railroad to enter into arrangements with the independent motor carriers.
9. Traffic to be diverted from existing independent motor carriers.
10. The motor carrier operations of the Railway Express Agency.
11. The intention of the railroad to consolidate its motor carrier operations.
12. The reasonableness of proposed rate and accounting practices.
13. The distinction between railroad convenience and public convenience.

** 1. Less-carload traffic.
2. Offers of motor carriers to establish joint rates and routes.
3. Rates to be charged.
4. Profitableness of the proposed operations.
5. Tonnage involved.
6. Cost of operations.
7. Segregation of rail and motor operations.
8. Segregation of interstate and intrastate traffic.
9. Use of railroad facilities and employes.
10. Alternative certificate conditions.
11. Coordination of service with independent motor carriers.
12. Competition and monopoly.

I.

With respect to every subject of which the appellants complain either evidence was received, the reason it could not be furnished was satisfactorily explained, or the proferred testimony was manifestly irrelevant.

It is impracticable, in a proceeding of the magnitude here involved, to set forth within the proper confines of this brief all of the testimony relating to the topics with respect to which the appellants charge that evidence was improperly excluded. But a *seriatim* consideration of the enumeration of Section VIII of the Complaint (R. 12), documented with references to the testimony relating to the subjects listed, will demonstrate that the appellants' Complaint is met at the threshold by the record itself.

(1) *The complete cost of the proposed truck operation.* In virtually every case the Receivers' operating witness testified to the estimated cost of the proposed service, based upon experience with similar services of the Receivers which had been in operation for some time. Hamlet-Columbia transcript, (R. 272); Gaston-Garnett, (R. 318, 364); Richmond-Henderson, (R. 437, 438); Henderson-Raleigh, (R. 548, 549); Monroe-Rutherfordton, (R. 584, 585); Hamlet-Wilmington, (R. 605); Raleigh-Hamlet, (R. 615); Greenwood-Great Falls, (R. 793); Monroe-Waxhaw, (R. 820); Jacksonville-Live Oak-River Junction, (R. 676).

(2) *The tonnage to be handled by truck.* Whenever available the less-than-carload tonnage handled to and from the stations to be served by the proposed operations was stated. Hamlet-Columbia, (R. 264, 265, 273, 274); Gaston-Garnett, (R. 339, 340, 368, 369); McBee-Sumter, (R. 394, 395); Richmond-Henderson, (R. 445, 446); Monroe-Rutherfordton, (R. 588, 589).

(3) and (4) *The revenues to be derived from the truck operations and the segregation of motor expenses and revenues.* It was explained that the truck services would be so closely integrated with rail operations that segregation of the revenues and expenses of the respective services was impracticable. Hamlet-Columbia, (R. 268, 269); Gaston-Garnett, (R. 341, 342); Jacksonville-Live Oak-River Junction, (R. 771).

(5), (7) and (9) *The economic effect on existing motor carriers, destructive competition flowing from subsidized truck operations, and traffic to be diverted from independent motor carriers.* These statements are but three different phrasings of the assertion that appellants were not allowed to show "unnecessary, unfair and destructive competition." We shall later discuss (*post*, pp. 57-59) the evidentiary basis for the Commission's finding that the proposed services would not invade the field of existing motor carriers. The references which are there made to the record disclose that this subject was fully explored.

(6) and (8) *The willingness and ability of existing motor carriers to perform the service, and the refusal of the railroad to enter into arrangements with the independent motor carriers.* No contention was made that existing motor carriers were *unwilling* to perform the proposed service, and witnesses for protestant carriers at the hearings were allowed wide latitude in showing the extent of their operations which they presumably claimed could be used for that purpose. See, for example, the transcript of the Richmond-Henderson hearing (R. 504 *et seq.*) at which testimony was received relating to the operation of existing motor carriers from Richmond, Va., on the north to Columbia,

S. C., on the south and from Wilmington, N. C., on the east to Rutherfordton, N. C., on the west, or, in other words, the entire territory covered by the group of eight applications first and concurrently filed by the Receivers. *The impracticability of utilizing independent operators and the many reasons for the Receivers' refusal to enter into such arrangements*, however, were fully explained by the applicants' witnesses, an example of such testimony appearing in the transcript of the hearings of the four North Carolina routes, i. e., Henderson-Raleigh, Hamlet-Raleigh, Hamlet - Wilmington and Monroe-Rutherfordton (R. 554 to 557). Moreover, certain protestant motor carriers conceded that when, as in most instances, they served only short segments of the proposed routes (R. 560, 627, 634) they could not provide the type of operation required (R. 514); and they were not prepared or willing to handle shipments in the small quantities for which the service was primarily designed (R. 516-17, 632). This and similar evidence in other proceedings fully support the Commission's findings that the proposed services cannot be effectively performed by existing motor carriers (28 M. C. C. 5, 21, R. 109, 114, 129).*

(10) *The motor carrier operations of the Railway Express Agency.* In this respect evidence was ex-excluded. From time to time efforts were made to inject

*The same conclusion has been reached by the Commission in many other proceedings in which railroads have sought motor carrier certificates for auxiliary or supplemental service. The reasons assigned by the Commission for this finding are virtually the same in all cases, stemming from the specialized nature of the service which requires for its effective functioning complete unity of control of both rail and highway operation. *Kansas City Southern Transport Co. Application*, 10 M. C. C. 221; *Gulf, Mobile & N. R. Co. Application*, 18 M. C. C. 721; *The Willett Co. of Indiana Extension of Operations*, 21 M. C. C. 405; *Rock Island Motor Transit Co. Application*, 21 M. C. C. 513; *Missouri Pacific R. R. Co. Extension of Operation*, 20 M. C. C. 563; *Indiana R. R. Extension*, 21 M. C. C. 73.

into the records the truck operations of the Railway Express Agency. Counsel for the protestant carriers, when asked what possible relevancy to the issues before the Commission such information might have, stated only that the Express Agency was owned by the railroads. (Hearing on petition for modification of restrictions, November 12th and 13th, 1941 (R. 110, 111). There was no claim that the Agency operated in the territory in which the Receivers' rights were sought nor any explanation of the relevancy of such testimony to any matter in issue. Its exclusion was therefore eminently proper.

(11) *The intention of the railroad to consolidate its motor carrier operations.* The testimony heretofore referred to (*ante*, pp. 19-24) demonstrates the extent to which this matter was discussed. The assertion that the Commission refused to receive and consider such evidence is categorically refuted by the record.

(12) *The reasonableness of proposed rate and accounting practices.* Rate problems and methods of accounting, for the reasons already explained (*ante*, pp. 42-46), have no conceivable bearing upon the issue of public convenience and necessity presented to the Commission in applications for certificates pursuant to the Motor Carrier Act. They are matters with respect to which the Commission's duties and authority conferred by Sections 217 and 220 come into play after a certificate has been granted, and they do not condition the granting of the authority. Accordingly, evidence in respect of these subjects was wholly immaterial.

(13) *The distinction between railroad convenience*

and public convenience. The relation between this feature of the Complaint and any action of the Commission in excluding evidence is obscure. On frequent occasions the protestants apparently claimed that the testimony of the Receivers showed railroad convenience but not public convenience and necessity. In so doing they urge a legal postulate and not a procedural objection. Moreover, they stand on a position which is squarely opposed by controlling decisions of this Court. *Texas* v. *United States*, 292 U. S. 522, 78 L. Ed. 1402, 54 Sup. Ct. Rep. 819; *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 77 L. Ed. 138, 53 Sup. Ct. Rep. 45. In any event the record is so replete with uncontroverted evidence of the benefits which the public, as contrasted with the railroad, would derive from the proposed service that the charge that evidence in this matter was excluded is wholly baseless.*

2.

The appellants having failed to particularize the prejudice claimed to have resulted from the exclusion of evidence, the court will not presume that they have been denied a fair hearing.

While it is thus plain that the record itself demonstrates that the Commission's rulings on evidence are

*As to the eunumeration in Section XI of the Complaint (R. 16) of subjects regarding which evidence is alleged to have been excluded, it will be observed (1) that in large part they merely duplicate the subjects listed in Section VIII (R. 12), and (2) that these alleged exclusions refer to the further hearing and were therefore proper in view of the narrow purpose for which the proceeding had been reopened, i. e., "solely to determine whether Condition 3 as set forth in the prior report, 28 M. C. C. 5 (that is the key-station limitations as prescribed on oral argument), should be modified and, if so, the extent of such modification." Clearly, the appellants were not entitled at that stage to reopening *in extenso*. *Vinson* v. *Washington Gas Light Co.*, 321 U. S. 489, 64 Sup. Ct. Rep. 731, 88 L. Ed. 646; *Interstate Commerce Commission, et al.* v. *Jersey City, et al.*, 322 U. S. 503, 64 Sup. Ct. Rep. 1129, 88 L. Ed. 1064.

in fact beyond tenable criticism, there is another and equally controlling reason why the orders cannot be successfully assailed on that ground. As we have repeatedly stated, the injury which the appellants attribute to the asserted procedural irregularity in the handling of the cases is that it deprived them of the opportunity to defend themselves against "unnecessary, unfair and destructive competition and undue restraint of competition, and were denied a fair and reasonable hearing" (R. 12). Exclusion of evidence, however material it may be, does not *per se* invalidate the Commission's orders. Injury, tangible and substantial and not merely hypothetical, must appear.

A recent decision of this Court reaffirms this established doctrine. In *Chicago, St. Paul, M. & O. R. Co.* v. *United States*, 322 U. S. 1, 88 L. Ed. 771, 64 Sup. Ct. Rep. 842, the Court reviewed an order of the Commission granting motor carrier certificates to an applicant which in the course of the proceeding amended its application by withdrawing from the authority requested the right to operate between points in Minnesota. Nevertheless the Commission found that service in that territory was needed and included this area in the order granting the certificate. Five opposing railroads contested the order, claiming that the withdrawal of the request for operating rights had thrown them off their guard, that relying on the withdrawal they had refrained from submitting evidence touching the need for service in Minnesota, and that they had therefore been deprived of the opportunity for a fair and adequate hearing on the matters ultimately decided. The Court stated, however, that the petition for reconsideration which the protesting railroads had

filed with the Commission was not of record, that accordingly the Court could not determine "whether surprise was claimed and evidence was indicated that could be added on rehearing," and denied the relief sought, stating:

> "The Court endeavors to protect the right of parties to fair hearings, but it will not presume that their rights have been substantially denied when they do not embrace the opportunity to prove their grievance in the court below."

Although the appellants have persistently urged their protest against the exclusion of evidence the record before the Commission is barren of any particularization of prejudice more specific than the generality of the Complaint, and no additional evidence in this respect was offered to the court below. Section XIV of the Complaint (R. 21) does list two categories of asserted injury,* namely, (1) that the issuance of the Receivers' certificates threatens the economic stability of independent motor carriers, and (2) that the failure of the Commission to require equal rate making and accounting regulations of motor carrier operations of railroads and independent carriers subjects the appellants to unreasonable discriminatory and destructive competitive practices. But with complete liberty to

*A third statement merely consolidates and repeats the first two.

submit evidence substantiating these charges* the appellants have failed to do so before either the Commission or the Court. In this state of the record the appellants have offered to the Court no bais for concluding that they were deprived of a fair hearing by the asserted exclusion of evidence.

3

Since none of the evidence claimed to have been excluded would have controverted the Commission's finding that the Receivers' operations would have no substantial competitive impact on existing motor carriers, its rejection would have been non-prejudicial.

But even had the evidence complained of in fact been excluded the appellants cannot prevail in their contention for a further reason. The injury which is said to have flowed from the refusal of the Joint Boards to receive and consider the specified evidence is, as stated, the inability of the appellants to defend themselves against unnecessary, unfair and destructive competition and undue restraint of competition. In its report and order of July 11, 1939, issued after the original hearings (17 M. C. C. 413, R. 81), the Commission,

*The only evidence offered by the appellants and excluded by some of the Joint Boards related to existing truck operations in territory which did not include that served by the proposed route under consideration. In at least one proceeding even that limitation was not observed, the Board admitting testimony showing all motor carriers then operating throughout the entire area to be traversed by the group of eight contiguous routes proposed by the Receivers from Richmond, Va., to Columbia, S. C., and from Wilmington, N. C., to Rutherfordton, N. C., although only the service between Richmond, Va., and Henderson, N. C., was before the Board at the time (R. 504 *et seq.*). Moreover, in every case in which evidence of existing motor carrier operations within the limits of the particular application before the Board was offered it was received. The protestant motor carriers were therefore allowed to show in the several proceedings all existing motor carrier service throughout the entire area involved in all applications. This was admitted by counsel for the protestant truck lines at the hearing to modify the key stations, who stated: "The prior hearings did afford an opportunity to the independent truck lines to show the competitive aspects of the application and those independent truck lines accepted that opportunity * * *." (R. 1224).

finding that "in most instances there is adequate motor carrier service over the considered routes," reached the conclusion that it does not "appear from the records made in these cases *that there will be any great diversion of traffic from existing independent motor carriers*" (R. 105; italics supplied). In the report and order of January 24, 1941, (28 M. C. C. 5, R. 109) in which the motor operations of the Receivers and certain other rail lines were under consideration, the Commission, in discussing the auxiliary type of service to which the Receivers are limited, stated: "It was further found, and properly we think, *that the development of the coordinated service would not seriously endanger the operations of existing motor carriers*" (R. 114; italics supplied). Finally in its report and order of July 6, 1942, (34 M. C. C. 441, R. 151), modifying the key station restrictions previously imposed, the Commission found (R. 155):

> "The applicants' motor vehicle service has been and will continue to be of a different character from that performed by protestants or motor carriers generally, and this is so whether we grant or deny the requested changes, which would merely relieve applicants from what they consider burdensome limitations in performing that service, rather than change the character of service previously authorized. Applicants' motor vehicle operations have been and will continue to be limited to the handling of merchandise rail traffic to and from points on their rail line as a substitute for train service. It is but a substitution of a more efficient for a less efficient means of service. The traffic has been and will continue to be rail traffic which moves at rail rates and on rail billing and which the railway

has been and will continue to be under an obligation to transport. Applicants, as a motor carrier, do not solicit traffic from the general public but merely utilize motor vehicles in fulfilling their undertaking to transport as a railway. The motor vehicle service is so limited by Condition 1. The modifications requested will in no way change the character of the service applicants are authorized to perform as a motor carrier; *nor will they adversely affect the operations of existing motor carriers, nor restrain competition in the motor carrier field.*" (Italics supplied.)

It is manifest from the passage just quoted that the conclusion of the Commission that the Receivers' auxiliary trucking service was not and would not in the future be competitive with independent motor carrier operations was predicated upon the inherent nature of the auxiliary service. Amounting to nothing more than the substitution of a more efficient for a less efficient means of operation in respect of traffic that would in any event move by rail, the auxiliary service was found to be at once beneficial to the public and innocuous to the legitimate interests and ambitions of the independent motor carriers. It will be observed that none of the enumerated subjects of the evidence claimed to have been rejected went to the inherent nature of auxiliary motor service performed by rail carriers, and hence could in no event have affected the conclusion of the Commission that such service does not invade the independent motor carrier field.

Even were the testimony bearing on this question conflicting, the Court would not substitute its judgment for that of the Commission. *Alton R. Co.* v.

United States, 315 U. S. 15, 86 L. Ed. 586, 62 Sup. Ct. Rep. 432; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 62 Sup. Ct. Rep. 722, 86 L. Ed. 971. However, a cursory examination of the record will disclose that there is adequate basis for the Commission's conclusion. It was repeatedly shown that the proposed service would handle only less-than-carload traffic that would otherwise move by rail.* See Hamlet-Columbia transcript, (R. 247, 254); Gaston-Garnett, (R. 340, 341); Richmond-Henderson, (R. 436, 442); Hamlet-Raleigh, (R. 611, 612); Jacksonville-Live Oak-River Junction, (R. 670, 765). Hence, as the Commission has stated (34 M. C. C. 441, 443-4, R. 155):

> "The traffic has been and will continue to be rail traffic which moves at rail rates and on rail billing and which the railway has been and will continue to be under an obligation to transport."

In other words, the service is non-competitive on the highways with the operations of independent motor carriers because of its specialized nature; and it cannot be maintained that the evidence failed to establish what the nature of the proposed services was.

Moreover, in those cases in which the possibility that the proposed service would divert traffic from existing motor carriers was suggested, convincing reasons why that would not occur were advanced. For example, aside from the fact, just observed, that the Receivers' trucks would confine their service to handling traffic which had theretofore and would thereafter be moved by the railroad, the authorized routes, fol-

*The statement in the appellants' brief (p. 163) that the Receivers also proposed to handle carload traffic is without foundation.

lowing the rail lines, would in many instances be so circuitous as to prevent successful competition with the more direct highway routes of existing motor carriers (Hamlet-Columbia, R. 277, 278). The bulk of the tonnage handled would consist of merchandise which moves from distant origins, is carried to break-bulk points by rail, and would therefore be handled to destinations by the railroad if the Receivers' truck service was not available (Gaston-Garnett, R. 297).

Thus it is manifest that the thrice repeated finding of the Commission that the proposed services would not compete with existing motor carriers* finds abundant support in the record. Hence, even though the evidence, the exclusion of which is complained of, had in fact been rejected, its omission could not have altered in any way the ultimate conclusion of the Commission that the certificates should issue, and its exclusion was wholly non-prejudicial.

The Appellants' position that the Commission has adopted erroneous criteria for determining applications by railroads for motor carrier certificates is without foundation.

From the extensive treatment which on brief the appellants accord the contention that the orders here involved are void because the Commission has adopted erroneous criteria in determining the ultimate issue of public convenience and necessity it is evident that they attach paramount importance to this aspect of the case. Their position in this respect is stated in their own language as follows:**

*17 M. C. C. 413, 432, R. 105; 28 M. C. C. 5, 8, R. 114; 34 M. C. C. 443-4, R. 155.

**The quotations is from pages 34 and 35 of the appellants' brief.

> "In this case the Commission has applied, with full force and effect, certain criteria which the Commission has invented and developed piecemeal, by a series of related proceedings involving the same subject matter. The Commission now proceeds on the theory that when a railroad desires to improve its railroad service and desires to operate as both a railroad and a motor carrier, it is entitled to a motor carrier certificate as a matter of right.
>
> "This policy disregards the adequacy of existing motor carrier service; disregards the willingness and ability of existing motor carriers to coordinate their motor carrier operations and services with the railroad; disregards the effect of new and additional competition on the economic stability of existing independent common carriers by motor vehicle; and disregards the statutory requirements for a fair and reasonable hearing and the statutory requirements for findings of facts."

In other words the appellants claim that the standard of proof of public convenience and necessity demanded by the Commission of railroads in motor carrier cases differs in material respects from the tests applied when independent operators seek certificates, and that this discrepancy in the criteria adopted in the two classes of proceeding is arbitrary and capricious. Implicit in this position is a complete misconception of the scope and meaning of "public convenience and necessity" and a basic misapprehension of the manner in which that language has been applied by the Commission in these cases.

The term "public convenience and necessity" is generic. It attempts no more than to set up the guid-

ing framework for the exercise of the Commission's judgment, leaving to that expert tribunal the widest latitude for a more precise definition in an almost unlimited variety of circumstances. As this Court has said in *Chesapeake & O. Ry. Co.* v. *U. S.*, 283 U. S. 35, 42, 75 L. Ed. 824, 829, 51 Sup. Ct. Rep. 337, 339:

> "*There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction.* Under the Act it was the duty of the Commission to find the facts, and, in the exercise of a reasonable judgment, to determine that question. *Texas & Pacific Ry. Co.* v. *Gulf, etc. Ry. Co.*, 270 U. S. 266, 273, 46 S. Ct. 263, 70 L. Ed. 578." (Italics supplied.)

In *Pennsylvania R. Co.* v. *United States*, 40 Fed. (2d) 921, the Court described in the following language the authority of the Commission to determine questions of public convenience and necessity (p. 923):

> "This discretionary authority * * * was vested in the Commission because of its peculiar function and extensive knowledge in respect to matters of interstate transportation, *and there is little in the statute to indicate, or to limit, the manner in which the Commission should exercise this discretion.*" (Italics supplied.)

Analogous provisions of state statutes have been similarly characterized. In a decision by the Supreme Court of Utah in *Union Pacific R. Co.* v. *Public Service Commission*, 135 Pac. (2d) 915, the Court said (p. 918):

> "As to what constitutes 'public convenience and necessity' must fundamentally have reference to the facts and circumstances of each given case as it arises, as the term is not, and was not intended to be, susceptible of precise definition."

Thus the term "public convenience and necessity" is not one which can be defined by rigid formula, but must take its meaning from the factual environment of the individual case. It bears a close analogy to the phrase "ordinary care" in the field of torts which creates a broad standard without prescribing, because it would be impossible to do so, an inflexible rule of application that would fit every situation.

Viewed through this concept the fallacy of the appellants' assertion that in disposing of railroad applications for motor carrier certificates the Commission has adopted criteria differing from those employed for other applicants comes into clear focus. In both instances the standard is the same, viz., public convenience and necessity, and in both classes of investigation the same factors have been considered and evaluated. If a different conclusion results the basis for the difference is to be found in distinction of fact, not in variance in the governing criteria.

The appellants' charge that the criteria differ in railroad and other motor carrier proceedings is based upon the assertion that when a railroad is an applicant the Commission "totally disregards the adequacy of existing motor carrier service, totally disregards the willingness and ability of existing motor carriers to coordinate their motor carrier operations and services with the railroad, and totally disregards the effect of

new and additional competition on the economic stability of existing independent common carriers by motor vehicle." From this catalogue of sins of omission it is evident that the appellants have disregarded everything that the Commission has scrupulously taken into account.

With respect, first, to the adequacy of existing motor carrier service the Complaint manifestly cannot proceed on the theory that the Commission erred in failing to find the existence of other motor carriers in the involved territories, for the report in 17 M. C. C. 413 (R. 81) specifically stated that "in most instances there is adequate motor carrier service over the considered routes." (R. 104).* The contention must therefore be that the availability of other services has not induced the Commission to deny the certificates, and in that posture it merely takes exception to a conclusion for which there is such an abundance of supporting evidence as to leave no room for reasonable doubt. The motor carrier service of the Receivers, as the Commission found (34 M. C. C. 441, 443-4, R. 151, 155), "has been and will continue to be of a different character from that performed by protestants or motor carriers generally." In this view the Commission finds unimpeachable corroboration from the decision of the Supreme Court in *Thomson* v. *United States*, 321 U. S. 19, 88 L. Ed. 326, 64 Sup. Ct. Rep. 392, wherein the Court, considering railroad motor carrier operations identical in character with those of the Receivers, said (U. S., p. 21, L. Ed., p. 327, Sup. Ct. Rep., p. 393) that they were

*It is perhaps unnecessary to state that the motor carrier service to which the Commission refers is that of existing operators who, as will presently appear, cannot satisfactorily furnish the highly specialized form of service here involved.

> "merely a new method of carrying on part of its [the railroad's] all rail freight business in which it had been engaged for years"

and further observed (U. S., p. 24, L. Ed., p. 329, Sup. Ct. Rep., p. 395):

> "As an integral and essential part of this service tendered by the railroad motor vehicle transportation between certain stations is provided. It is completely synchronized with the rail service, *and has none of the elements of an independent service offered on behalf of motor vehicle operators.*" (Italics supplied.)

Because of the different and highly specialized nature of the Receivers' operations the Commission found that existing motor carriers could not themselves effectively perform it. This conclusion was not reached in a vacuum, or without adequate factual basis. On the contrary the Commission gave the most studious consideration to the vigorous assertions of protestant motor carriers that they should be allowed to function in this capacity, and after exhaustive analysis and discussion* rejected the contention, holding (28 M. C. C. 21):

> "We find that the useful public service which would be served by coordination of rail and truck service could not be served as well by existing motor carriers * * *."**

From the foregoing it is clear beyond dispute that the Commission, far from ignoring the adequacy of

*28 M. C. C. 5, pp. 15-21, R. 123-129. See also *Kansas City Southern Transport Co. Common Carrier Application*, 10 M. C. C. 221, 235, 236.

**The same conclusion has been reached in many other decisions. See cases cited in footnote, p. 50.

existing motor carrier service, has accorded the existence of such service the most scrupulous attention. Having done so it has, for convincing reasons, decided that this factor affords no ground for denying the public the benefit of the proposed service, a conclusion for which this Court will not substitute a different conclusion of its own.

What has just been said obviously answers the second and corollary indictment that the Commission has disregarded "the willingness and ability of existing motor carriers to coordinate their motor carrier operations and services with the railroad." As previously observed* we have not questioned the *willingness* of the appellants to arrogate to themselves this particular part of the railroad's business. *Willingness*, however, does not connote *ability*, and as to the latter the Commission has found against the appellants on a record which plainly supports its decision.**

The third and final specification supporting the "criteria" complaint is that the Commission has disregarded "the effect of new and additional competition on the economic stability of existing independent common carriers by motor vehicle." In our review of the testimony controverting the appellants' claim that evidence was improperly excluded we have discussed at some length the support in the record for the Commission's finding that the proposed services would not compete with existing carriers.*** Nothing more is needed to demonstrate that this factor was considered, that the Commission's finding was fully warranted by

Ante, p. 49.
**Ante*, p. 50.
***Ante*, pp. 57-59.

the evidence, and that the appellants' position in this respect is without foundation.

From this analysis of the case as it comes to the Court it is plain, as stated at the outset, that what the appellants conceive to be fundamental errors in the criteria employed by the Commission in reaching the ultimate finding of public convenience and necessity are in reality but controlling differences in the factual constituents, differences which have constrained the Commission to reach a conclusion unacceptable to the appellants but unassailable in law. In both classes of proceedings the Commission applies the same basic tests, namely, (1) is there a public need for the proposed service; (2) will it compete prejudicially with existing motor carriers; (3) if so, can the existing operators effectively provide the service? *Pan American Bus Lines Operation*, 1 M. C. C. 190, 203. In the instant case, the Commission, on the basis of adequate evidence, has found that there is public need for the service, that it will not prejudically affect existing motor carriers, and that existing motor carriers cannot effectively provide the service. Thus the foundation for the ultimate finding of public convenience and necessity rests upon application of the identical criteria used in all cases, whether the applicant be a railroad or an independent motor carrier.*

The decisions principally relied on by the appellants as sustaining their position in this respect re-

*The statement in the appellants' brief (p. 7) that "The court [below] concluded that * * * the Commission was warranted in departing from the normal criteria of public convenience and necessity" is incorrect. In this respect the court said: "There is ample warrant in the record for the Commission's finding that, *under proper criteria reasonably applied*, public convenience and necessity would be best served by granting these certificates * * * to the Seaboard." (Italics supplied.)

main for considerations. These are *Eastern-Central Motor Carriers Association* v. *United States*, 321 U. S. 194, 88 L. Ed. 431, 64 Sup. Ct. Rep. 499; *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, 86 L. Ed. 971, 62 Sup. Ct. Rep. 722; *Yonkers* v. *United States*, 320 U. S. 685, 88 L. Ed. 241, 64 Sup. Ct. Rep. 327; and *New York Central R. Co.* v. *Public Utilities Commission*, (1931) 123 Ohio St. 370, 175 N. E. 596.

In the *Eastern-Central Motor Carriers Association* case this court reviewed an order of the Commission (34 M. C. C. 641) rejecting tariffs filed by a group of motor carriers publishing a scale of rates on floor-covering lower for weights exceeding 30,000 pounds than for volumes between 20,000 and 30,000 pounds. The Commission had disapproved the rates because loads in excess of 20,000 pounds would require more than one vehicle, the carriers had failed to show a reduction in the cost of handling the larger volumes, and consequently the resultant discrimination against the smaller shipper was unreasonable. In thus tying the permissible rate differential solely to the volume factor the Court held that the Commission adopted a policy which made reduction in cost of handling the sole criterion of decision, and wholly disregarded the possible prejudicial effect of such a policy on motor carriers in their competition with other forms of transportation, with "consequences affecting not only the carriers but the public interest as well." This, the Court said (321 U. S. 203, 88 L. Ed. 436, 64 Sup. Ct. Rep. 504.

> "is not merely to adopt 'a policy of administration' * * *; but rather to adopt, as a rule of law, the principle that only upon a showing of

reduction in operating costs may a volume minimum rate be found reasonable and not unduly discriminatory."

That there is no parallel between that case and the one before the Court is obvious. There the Commission, in determining the propriety of the rates in issue, had admittedly ignored the effect of its decision upon the competitive status of motor carriers. Here that factor, as we have repeatedly demonstrated, was accorded the most meticulous consideration. There the Commission, in excluding competitive conditions as immaterial, had proceeded upon an erroneous "rule of law." In the instant case no such charge can be sustained, for the Commission has taken into account every element essential to a determination of the ultimate questions before it. In short, whereas, in the *Eastern-Central* case the Commission misconstrued its governing stautory mandates, in the instant case only a proper exercise of the Commission's administrative functions is involved, and it has thus confined its action to the province committed to its discretion by law.

The *Carolina Freight Carriers Corporation* case is similarly distinguishable. The Commission had granted a "grandfather clause" certificate* authorizing operation as a common carrier by motor vehicle between points in designated territories and over irregular routes. It had, however, limited the commodities which might be transported to those which had been carried in substantial amounts and with a degree of regularity both before and after the grandfather clause date, excluding articles which had been handled before

*49 U. S. C. A., Sec. 206(a).

but not after that date. This the Court held to be error. It explained that the statutory definition of a common carrier by motor vehicle is one who "undertakes * * * to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes."* The common carrier status of the applicant having been established, the test of commodities which it is entitled to handle is the scope of its undertaking. When dealing with regular route operators the Commission did not measure this scope by the service actually rendered on and since the statutory date. In excluding from the rights granted irregular route applicants those commodities which had been carried before but not after the grandfather clause date the Commission erroneously regarded continuity of handling as the sole measure of the applicant's undertaking, and furthermore established "a different test for commodities which may be carried by irregular route operators than for commodities which may be carried by regular route operators." This distinction in treatment between the two classes was "erroneous as a matter of law." (315 U. S. 485-6, 86, L. Ed. 981, 62 Sup. Ct. Rep. 728).

Again it is clear that the basis of the Court's criticism of the Commission's action in the *Carolina Freight Carriers* case is absent here. In defining the term "common carrier by motor vehicle" the Act prescribes a definite standard by which the rights to which an applicant qualified under the grandfather clause is entitled are to be determined, without distinction as between regular and irregular route operators. This

*49 U. S. C. A., Sec. 303(a)(14).

statutory standard is the scope of his undertaking, which in turn is to be measured by the extent to which he holds himself out to serve the public. That he has not in fact transported certain commodities or groups of commodities subsequent to the grandfather clause date does not of itself exclude such commodities from the scope of his undertaking, for, as the Court said (315 U. S. 484, 86 L. Ed. 980):

> "the natural and normal course of his business may reveal a continuous undertaking to transport any or all commodities."

Hence, in arbitrarily excluding from the granted rights those commodities which had not been transported after the grandfather clause date—a standard which was not enforced against regular route operators—the Commission misconstrued the Act and committed error as a matter of law.

In the pending case, on the other hand, the Commission, mandated only by the requirement that a certificate shall issue upon a finding of public convenience and necessity, has examined the facts, considered every element appropriate and relevant to the criterion thus imposed, and, with ample supporting evidence, has concluded that the certificate should issue. In so doing it has but exercised the administrative duties which have been confided to it and has observed the same standards as are applied in similar proceedings. Its action is therefore legally unassailable.

The last of the decisions of this Court mainly relied on by the appellants as sustaining the "criteria" argument is *Yonkers* v. *United States*, 320 U. S. 685, 88 L. Ed. 241, 64 Sup. Ct. Rep. 327. Paragraph (22)

of Section 1 of the Interstate Commerce Act withholds from the Commission power to authorize abandonment "of street, suburban or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." The Commission had approved the abandonemt of an electric branch of the New York Central Railroad Company without finding whether is was operated as a part of its steam railroad. The Court held that this omission was fatal to the order. In so doing it explained that the exemption of this type of line from the Commission's abandonment authority reflected "a Congressional policy of reserving exclusively to the states control over that group of essentially local activities," that this policy "required the Commission to show meticulous respect for the interests of the States" by making the findings essential to its jurisdiction, and that although the reviewing court might itself make that determination initially it should refuse to do so without the assistance of the Commission's "expert judgment on a knotty phase of a technical subject."

Commenting on this decision the appellants claim that there is a parallel between the Commission's failure to observe a statutory mandate "in cases involving national and local interests, on the one hand, and cases involving the interests of competing transportation agencies, such as railroads and motor carriers."* The analogy is obscure. We are not told in what respects the Commission has here failed to make essential findings or how otherwise the doctrine of the *Yonkers* case is cognate. Since it determines the narrow question whether an affirmative finding by the Commission of a

*Appellants' brief, pp. 43, 44.

jurisdictional fact prescribed by statute is essential to the validity of a Commission order, and the basis of the Commission's jurisdiction in the instant case is not and cannot be questioned, the *Yonkers* decision manifestly has no application here.

The appellants further cite *New York Central R. Co.* v. *Public Utilities Commission*, (1931) 123 Ohio St. 370, 175 N. E. 596. There the railroad had applied for a certificate under the state law for authority to operate a motor carrier service over a regular route between Cleveland, Toledo and Danbury, Ohio. The evidence showed, and the Public Utilities Commission found, that all points on the proposed route* were served by existing carriers. The Commission denied the application and on review the Court sustained the decision. It said that the Ohio law, as construed by the Court, precluded the granting of a certificate unless it appeared that another motor carrier, if any, holding a certificate covering the same route is not rendering adequate service, and is not able, ready and willing to provide the additional service. Since the Commission's findings negatived these essential prerequisites of public convenience and necessity, the issuance of the certificate was not warranted.

In appraising this decision it is to be first observed that the Ohio statute, as construed by the Court, differs from the corresponding provisions of Part II of the Interstate Commerce Act in that it conferred upon existing operators a preemptive right to provide all service on the authorized routes provided they were ready, able and willing to do so, regardless of whether the proposed additional service was competitive with

*With four exceptions as to which no evidence was offered.

established motor carriers. This rigid restriction finds no counterpart in the Interstate Commerce Act, and thus the State Commission was functioning within a far narrower sphere of administrative discretion than does the federal tribunal.

Aside from this distinction in the respective laws, however, it is important to note that there the Commission had found that the existing carriers were ready, able and willing to render the additional service. Whether this finding was predicated upon the fact that the railroad was proposing a type of operation so broad in scope and purpose that it was similar in all respects to that of existing motor carriers, or merely reflects a difference of opinion between the state and federal Commissions as to the ability of such carriers to provide the more limited auxiliary service here involved, is not disclosed by the opinion, nor is it of consequence. The essential distinction is that in the Ohio case the state Commission decided that existing carriers could perform this service whereas here the federal Commission, on adequate evidence, reached an opposite conclusion.

If we disregard the distinguishing features of the Ohio case to which we have just pointed, and assume that it supports the position for which it is cited, it by no means represents the contemporary attitude of state courts toward this type of service. In *Thomson* v. *Iowa State Commerce Commission*, (1944) 15 N. W. 2d 603, the Supreme Court of Iowa has decided a case so strikingly parallel in its factual background to that here before the Court that we discuss it at some length.

The Trustee for the Chicago & Northwestern Rail-

way Company had there applied to the Iowa State Commerce Commission for a certificate authorizing intrastate operations as a motor carrier over ten routes between fixed termini. The railroad proposed identically the same type of supplemental or auxiliary service as the Receivers provide. The application was opposed by virtually all existing motor carriers on the principal ground that the railroad's purpose could be accomplished by those already holding operating rights. In a decision by two of the three members, and over the vigorous dissent of the remaining member, the application was denied. The railroad appealed to the county district court on the ground that the evidence before the Commission failed to support its findings and conclusions. The opposing motor carriers intervened in support of the Commission, again asserting that the proposed service would duplicate their own. The lower court reversed the Commission and was sustained on appeal to the State Supreme Court.

The nature of the proposed service, identical with those here involved, was described by the appellate court in the following passage from the opinion of the district court (15 N. W. 2d 604, 605):

> "Applicant merely proposes to improve an existing service through the utilization of motor vehicles in rendering a service which will be auxiliary to, supplemental of, and coordinate with the rail service. Applicant does not propose to invade territory of any other carrier. All of the points are stations on the rail line which applicant has served for years and is under obligation to continue to serve. Applicant merely proposes to improve that service in an endeavor to retain existing patrons, offering

them a service more in keeping with their requirements under existing merchandising methods. To say that such service will adversely affect the operations of existing motor carriers is to admit superiority of the proposed service which protestants strongly deny."

The Court then quoted with full approval the following excerpt from the opinion of the dissenting Commissioner (pp. 607, 608):

"It is my view that an approval of the application as presented in this case would have been an approval of a strictly limited type of service. *The service proposed is really a sequence of operations, each to be performed within a particular division, independently for all practical purposes, of the motor operations within other divisions.* As far as exclusively motor operations are concerned the only competitive effect of the proposed service would be in connection with short intra-division hauls. Revenue from such hauls, in comparison with protestants' total revenues, is of minor importance. As a practical matter, I believe, the substantial part of operations under applicant's time schedule would necessarily have been confined to the movement of freight previously moved by rail or destined for further rail movement. (Italics supplied.)

* * * * * * *

"It is my thought that the proceedings actually before us have required only a consideration of a supplementary and auxiliary rail service—in a manner of speaking, a type of extended pick up and delivery service. As to the effect of a more unlimited service on the public welfare, such should properly have been left

for consideration at such future time as applicant might propose an extension of operation.

* * * * * *

"I do not mean to say by the foregoing that it is my view that this Commission should depart at this time from its previous policy of denying applications for competitive service in the ordinary situation. Had applicant in this proceeding been an independent motor carrier, offering no better or different service than that presently performed by protestants, I should have joined with the majority in denying this application for want of public convenience and necessity. My previously expressed views are simply to the effect that this Commission is bound by no rule of law or even by any rule of stated policy invariably to reject an application for competitive service. It is my position that in a proper case such service may and should be permitted, and it is my further position that this is a proper case."

The appellate court sustained the lower court's reversal of the decision of the majority of the Commission, approving the views of the dissenting Commissioner just quoted and adding the following observations of its own (p. 608):

"As heretofore pointed out, the decision of Commissioner Richardson recognized that there was substantial evidence herein to sustain the contentions of the railroad. Of this there can be no doubt. The trial court was right in so holding. In determining whether the Commission or the trial court was right in deciding the effect to be given the record made by the resisting carriers, *it is vitally important to bear in*

mind that the service the railroad seeks authority for is merely auxiliary to, supplemental of, and coordinated with its rail service. Were this an application by an ordinary truck operator to merely duplicate existing motor carrier service, there is little doubt that the denial of the application was adequately supported by the record. It is only when proper emphasis is placed upon the special kind of service and its limitations as such that the erroneous character of the commission's decision becomes apparent." (Italics supplied.)

Commenting on the protestant motor carriers' insistence that they be permitted to provide the proposed service the Court said (p. 609):

> "The protesting motor carriers furnish no transportation by rail. No one of them is authorized to operate over the entire territory involved. Collectively, they do serve the territory as motor carriers only. But they do not and cannot furnish the type of service here proposed. It could be supplied only through agreements with the railroads. Most, if not all, of the intervenors offered assurances that they would be willing to work with the railroad. The testimony of the railroad's witnesses was that no satisfactory arrangement had been worked out and that none was possible because so many conflicting details in the operations of so many systems made proper coordination impossible."

The court then referred to a multitude of decisions of the Interstate Commerce Commission granting certificates to railroads pursuant to the Federal Motor Carrier Act, including specifically the initial report in the proceedings here involved (17 M. C. C. 413, R. 81),

concluding with the following unqualified approval of the principles upon which the Commission has proceeded (pp. 610, 611):

> "Of course, the decisions of the Interstate Commerce Commission are not binding precedents upon this court. However, the principles, announced and applied in the foregoing decisions, are so eminently fair, sound, just and reasonable that we have no hesitancy in adopting them as tenets which should be applied in determining whether the Commission should have issued a certificate of public convenience and necessity under the facts herein. We have carefully examined the numerous cases, cited by the Iowa Commission. None is in point or persuasive and certainly none is in any way decisive or controlling. The length of this opinion forbids a detailed analysis thereof. We are satisfied that, when the Iowa Commission shut its eyes to the basic principles, repeatedly recognized and applied by the Interstate Commerce Commission, it thereby disregarded the substantial rights of the applicant railroad. Its decision became manifestly unsound, unfair, arbitrary and unreasonable."

We have discussed this state court opinion extensively because it meets and, with exceptional clarity and penetration, disposes of every ground advanced in support of the "criteria" argument of the appellants. In a case which manifestly parallels that here before the Court so closely as to be incapable of tenable distinction it at once repudiates the charges that the Commission has failed to give proper consideration to the essential elements of public convenience and necessity and unequivocally approves the rationale of the Com-

mission's conclusions. That its views are in accord with those of this Court is plainly indicated in the decision in *Thomson* v. *United States*, 321 U. S. 19, 88 L. Ed. 326, 64 Sup. Ct. Rep. 392, affirming the basis of the Commission's finding that, because of essential differences in the nature of the motor carrier services of railroads and independent motor carriers, they would not compete. When to the force of these considerations is added the doctrine of *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 88 L. Ed. 358, 64 Sup. Ct. Rep. 370, committing to the experienced judgment of the Commission the evaluation and adjustment of all competitive features in determining where the public interest lies, all doubt of the validity of the Commission's actions vanishes.

We would be remiss if, before concluding our consideration of this aspect of the case, we failed to advert to one other ground urged by the appellants to support their position that different criteria have governed the Commission's determination of the two classes of motor carrier applications. It is said that no evidence can persuade the Commission to deny a certificate to a railroad applicant, and that the result is tantamount to a practice which permits railroads to secure motor operating authority virtually as a matter of right.* It would perhaps suffice, as an answer to this charge, that the instant case must be decided on its own merits, and that if the appellants cannot prevail on the record here they are not aided by recourse to what the Commission has done in other proceedings. The charge, however, is so sweeping an indictment of the policy pursued by the Commission in its treatment of the

*Appellants' brief, pp. 34, 70, 110.

railroad cases that comment is required, if only to repel the implications of silence.

With very few exceptions the Commission's grant of authority to railroads or their subsidiaries to operate as motor carriers has been limited to a service which is auxiliary to or supplemental of that of the railway, in other words to provide an "improved rail service through the use of trucks instead of trains as a *means* of fulfilling the Railway's undertaking to transport." *The Texas and Pacific Motor Transport Common Carrier Application*, 41 M. C. C. 721. The restriction thus imposed is usually implemented through the imposition of one of two types of conditions, i. e., (1) requiring that the trucks be used for the handling of only that traffic which receives a prior or subsequent rail haul, or (2) designating key stations which, through segmentation, prevent the use of motor vehicles in through service between or beyond principal points. Likewise the routes to be followed parallel the railroad, and the points to be served are confined to the rail stations. If with this limited operation it is established that beneficial improvements in the service rendered by the railroad can be effected the Commission in many cases has found the proposal to be required by public convenience and necessity and issued the requested certificate.

But beyond this the Commission has consistently declined to go. When from time to time it has been urged to permit railroads to provide an unrestricted highway service disassociated from their rail operations and substantially similar to that furnished by independent motor carriers, it has refused to do so. It has explained that the coordination of rail and highway

operations provides a new and different character of service which neither the railroad nor the trucks alone can supply, but that where existing motor carriers are already adequately operating there is no need for additional like service having no close relation to rail operations. *Kansas City Southern Transport Co. Common Carrier Operation*, 10 M. C. C. 221, 238.

That this practice* is not a mere theoretical abstraction but is affirmatively and aggressively enforced by the Commission is evidenced by recent decisions. In *Campbell Sixty-Six Express, Inc.* v. *Frisco Transporation Co.*, 43 M. C. C. 641, the Commission considered the complaint of a number of independent motor carriers protesting against the operations of a motor carrier subsidiary of the St. Louis-San Francisco Railway Company on the ground that in collaboration with the railway the motor carrier was performing a direct common carrier highway service unrelated to the operations of the proprietary railroad, in violation of its certificated rights. The nature of the defendant's operation was not disputed, the defense directing itself to a showing that the service as provided was beneficial to the public. Finding that the defendant motor carrier's operating rights were for the most part subject to the condition that the service to be rendered should be auxiliary or supplemental to the train service of the railroad, and that in failing to coordinate the two operations the defendant was exceeding its authority, the Commission reopened the proceedings to determine what conditions should be imposed to insure that the character of service rendered should conform to the limited authority contained in the certificates.

*Whether as a matter of transportation economics the Commission's restrictive practice is sound may be disputable. But that question is not here presented and is therefore beyond the purview of this discussion.

Similar action was taken by the Commission in *Frisco Transportation Co. Extension of Operation*, 41 M. C. C. 266; *Texas & Pacific Motor Transport Co. Common Carrier Application*, 41 M. C. C. 721, and *The Rock Island Motor Transit Co. Extension of Operations*, 43 M. C. C. 470.

It is thus apparent that the Commission's approach to the intricate problems posed by the efforts of the railroads to improve their service by utilizing highway operations has been marked by the utmost caution to safeguard the existing motor carriers against unnecessary encroachment into a field which they already occupy, and to eliminate from this process of modernization any undue competitive impact upon the independent motor carrier industry. When the railroads have confined their efforts to means essential to meet a demonstrated public need they have been approved. When this objective has been overreached the Commission has imposed restraints appropriate to confine the authority granted within limits which it considers proper.

With the practice of the Commission in these cases thus oriented, the appellants' charge that it has been arbitrary and capricious in that it grants to railroads motor operating authority virtually as a matter of right is seen to be without foundation. The caution with which the Commission has permitted the railroads to engage in highway service, the rigid restrictions with which it has surrounded their authority to do so, and the scrupulous protection which it has extended the independent carriers, display a discrimination in the discharge of its duties in this field of administrative responsibility which is beyond all tenable criticism.

The attack upon the Commission's orders on the ground that the Receivers' motor operations will tend to create a monopoly in the transportation field is wholly without substance.

In their complaint (R. 11, 18, 21) the appellants allege that the action of the Commission in permitting the Receivers and other railroads to engage in highway operations will tend to restrain competition and create monopoly in the motor carrier field. The averments in this respect are general and the supporting arguments obscure, but as we understand the appellants' position it amounts to nothing more than a professed apprehension that if railroads are permitted to engage in highway service they will, through a process of erosion, eventually drive the independent carriers from the field.

To this position, we submit, the decision of this Court in *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 88 L. Ed. 358, 64 Sup. Ct. Rep. 370, although arising under Section 5 and not Section 205, of the Act, is a conclusive answer. In that case the Commission had authorized the Associated Transport Company to acquire control of eight independent motor carriers collectively serving the Atlantic seaboard. The order of approval was attacked on the principal ground that the Commission gave insufficient weight to the "prohibitions and policies of the anti-trust laws." The complainants contended that although Section 5 of Part I of the Act exempts unifications from the *prohibitions* of those laws their *policy* was not suspended, and that the Commission should have withheld its approval unless satisfied that the proposal would not run counter to this policy, viewed independently of the

exemption contained in Section 5. Recognizing that this contention, taken "in its full sweep," would in effect nullify the exemption, the Court rejected it categorically.

But taken in a more limited scope, i. e., that the exemption provision was not a warrant to the Commission to ignore wholly the policies of the anti-trust laws in exercising its powers under Section 5, the contention was said "to pose a problem of accommodation of the Transportation Act and the anti-trust legislation." The duty of the Commission in meeting this problem is described in language which so aptly disposes of the appellants' position with respect to the monpoly feature of the instant case that we quote liberally from the opinion:

> "To secure the continuous, close and informed supervision which enforcement of legislative mandates frequently requires, Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. Thus, here, the Commission has no power to enforce the Sherman Act as such. It cannot decide definitely whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission op-

erates; and the policies expressed in it must be the basic determinants of its action." (321 U. S. 79-80): * * *

"The history of the development of the special national transportation policy suggests, quite apart from the explicit provisions of Section 5(11) that the policies of the anti-trust laws determine 'the public interest' in railroad regulation only in a qualified way. And the altered emphasis in railroad legislation on achieving an adequate, efficient, and economical system of transportation through close supervision of business operations and practices rather than through heavy reliance on the enforcement of free competition in various phases of the business, cf. *New York Cent. Securities Corp.* v. *United States*, 287 U. S. 12, 53 S. Ct. 45, 77 L. Ed. 138, has its counterpart in motor carrier policy. The premises of motor carrier regulation posit some curtailment of free and unrestrained competition. The origins and legislative history of the Motor Carrier Act adequately disclose that in it Congress recognized there may be occasions when 'competition between carriers may result in harm to the public as well as in benefit; and that when a [carrier] inflicts injury upon its rival it may be the public which ultimately bears the loss.' Cf. *Texas & P. R. Co.* v. *Gulf, C. & S. F. Co.*, 270 U. S. 266, 277, 70 L. Ed. 578, 46 S. Ct. 263." (321 U. S. 83-84). * * *

"In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation, and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the

over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.' 79 Cong. Rec. 12,207. "The wisdom and experience of that Commission" not of the courts must determine whether the proposed consolidation is 'consistent with the public interest.' Cf. *Interstate Commerce Commission* v. *Illinois C. R. Co.*, 215 U. S. 452, 54 L. Ed. 280; *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 35 S. Ct. 370, 59 L. Ed. 616; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 60 S. Ct. 931, 84 Ed. 1243; *Purcell* v. *United States*, 315 U. S. 381, 62 S. Ct. 709, 86 L. Ed. 910. If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order." (321 U. S. 87, 88).

That the order reviewed in this decision was entered in a proceeding arising under Section 5 of Part I of the Act and not Sections 206 and 207 of Part II strengthens rather than weakens its application to the instant case. Section 5 affords relief from the restraint of the anti-trust laws in respect, *inter alia*, of motor carrier unifications, whereas no such relief is provided as to motor carrier operations authorized pursuant to Section 207. Accordingly, while the Commission's approval of unifications under Section 5 effectively forestalls enforcement of the anti-trust laws, if, as the

result of the issuance of a certificate under Section 207, monopolistic tendencies develop the Department of Justice remains free to take appropriate action. Hence, a solicitous regard for the public interest demands even more careful scrutiny by the Commission of the competitive effect of a unification proposal under Section 5 than of a certificate application under Section 206; and if in a unification case the appraisal of the "effects of the curtailment of competition" is within the province of the Commission, *a fortiori* the range of its discretion in certificate proceedings is equally broad.

We have heretofore examined the record to point to the abundant evidence supporting the Commission's findings in three reports that the Receivers' motor operations would not adversely affect the operations of existing motor carriers, or restrain competition in the motor carrier field.* We have also adverted to the judicial approval of the basis of those findings evidenced in *Thomson* v. *United States*, 321 U. S. 19, 88 L. Ed. 326, 64 Sup. Ct. Rep. 392. Nothing more is needed to demonstrate that the Commission, in full conformity with the standards imposed upon it by the *McLean* case, has estimated the scope and appraised the effects of the Receivers' auxiliary service upon existing carriers, and has found, with ample support of record, that they would not run counter to the policies of the anti-trust laws. In this setting the Commission's conclusion is binding upon a reviewing Court. *McLean Trucking Co.* v. *United States*, *supra*, 321 U. S. 67, 88.

Ante, pp. 57-59.

The underlying objective of this suit is to exclude railroads from the highways for any purpose, however limited, and to establish the commercial use of the highways as the exclusive prerogative of non-rail affiliated motor carriers. In this posture the appellants are opposed by the National Transportation Policy and the legislative history of the Motor Carrier Act.

The vital role played by the transportation system of the nation in the development of its economic life has throughout virtually the entire history of its development been guided by public control. The dominant position occupied by the railroads from early days until comparatively recent times directed initial regulatory efforts primarily to the prevention of abuses which might grow out of their monopolistic position.

Beginning with the Transportation Act of 1920, however, restraint as the principal objective of regulation, yielding to the presssing conditions within the industry, was tempered with a new policy which accorded recognition to the need for building an efficient system of railways for the handling of the nation's traffic. *Dayton-Goose Creek R. Co. v. United States*, 263 U. S. 456, 478, 68 L. Ed. 388, 398, 44 Sup. Ct. Rep. 169, 172. In administering this policy the Commission was to give principal emphasis to the "adequacy of transportation service, * * * its essential conditions of economy and efficiency, and * * * appropriate provisions and best use of transportation facilities * * *." *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 25, 77 L. Ed. 138, 146, 53 Sup. Ct. Rep. 45, 48.

Shortly thereafter the emergence and development of other agencies called for an extension of the regulatory field. Highway carriers were playing an increasingly important part in the transportation economy. First the subject of state regulation, their activities in the interstate field resulted in the enactment of the Motor Carrier Act of 1935*, and later air carriers were brought under federal regulation by the Civil Aeronautics Act of 1938.**

The growing ramifications of the national transportation system inevitably brought to the fore increasingly complex problems of administration of the regulatory laws. In confiding to the Commission the responsibility for the regulation of both railroads and motor carriers Congress recognized that potential conflicts of interest between those two agencies could best be composed, and the expressed purpose of developing and coordinating a national transportation system by, among other means, rail and highway could be most effectively accomplished, by committing their supervision to the same tribunal, guided by the basic principles which have been enunciated in the National Transportation Policy. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 82, 88 L. Ed. 358, 366, 64 Sup. Ct. Rep. 370, 378.

Into this policy the appellants, by the objectives of this suit and the theories advanced in its support, would read an interdiction of the use of the highways by railroads for any purpose, however limited, whenever in the area to be served other motor carriers are in operation. For such a sweeping proscription neither the

*49 Stat. 543, c. 498.
**52 Stat. 973, c. 601.

language of the Act nor its legislative history furnishes any possible warrant. The National Transportation Policy, as stated above, was directed in terms to the broad principles which should govern the Commission in "a fair and impartial regulation of all *modes* of transportation," (italics supplied) and not to the agencies which should be permitted to utilize such modes. That railroads were not to be excluded from the field of motor transport is not only manifest from the absence in the language of the National Transportation Policy of any permissible inference to that effect and from the provisions of Section 5(2)(b)* which affirmatively recognize that Congress contemplated railroad participation in highway transportation,** but is indisputably clear from the legislative history of the statute.

The origin and background of the Motor Carrier Act of 1935 are described in the following passage from page 2 of Report No. 482 of the Senate Committee on Interstate Commerce, 74th Congress, dated April 11, 1935, accompanying S. 1629 which was enacted into Law:***

> "In 1933 the Congress, recognizing the existence of an emergency in transportation, enacted the Emergency Railroad Transportation Act, 1933, providing among other things, for a Federal Coordinator of Transportation * * *. Since June, 1933, the Coordinator has made elaborate surveys and studies of the need for regulation of transportation agencies. In his

*49 U. S. C. A., Sec. 5(2)(b).

**Cf. *Thomson* v. *United States*, 321 U. S. 19, 88 L. Ed. 326, 64 Sup. Ct. Rep. 392, where it was held that the railroad rather than the independent motor carriers was entitled to the requested certificate.

***Public—No. 255,—74th Congress, approved August 9, 1935.

report of March 10, 1934 (S. Doc. 152), he recommended, among other things, regulation of motor carriers comparable in large measure to that proposed in the bill herewith reported. This latter bill was proposed in the Coordinator's report for 1934 (H. Doc. 89), as the result of additional study, experience, and exchange of ideas between the Coordinator, the shippers, and the motor-carrier industry."*

The bill as finally enacted therefore reflected the views of the Commission and the Coordinator formed as the result of exhaustive investigations of the entire field of transportation. The attitude of the Commission toward railroad operation of highway carriers is stated in an early report of the Commission (1928), *Motor Bus and Truck Operation*, 140 I. C. C. 685, where the Commission concluded (p. 745):

> "Railroads, whether steam or electric, and water carriers, subject to the interstate commerce act, should be authorized to engage in interstate commerce by motor vehicles on the public highways, and thereafter such service should be subject to the provisions of the interstate commerce act, with the possible exception of section 15a, and legislation supplementary thereto. To the extent that a certificate of public convenience and necessity is an antecedent to the operation of other common-carrier motor vehicles, steam and electric railroads, and water carriers, subject to the interstate commerce act should be required to obtain a certificate of public convenience and necessity in like manner."

*Of like import is Report No. 1645 of the House Committee on Interstate and Foreign Commerce, 74th Congress, which accompanied S. 1629, when the bill was before the lower House. See page 2 of that Report.

Mr. Eastman, Coordinator of Transportation, testifying at the hearings before the Senate Committee on Interstate Commerce on S. 1629, 74th Congress, 1st session; Part I, p. 85, said:

> "Senator Couzens. I understood you to say yesterday that this bill provides for a coordination by one agency of the several means of transportation, such as a railroad, a bus line, a truck line, a water line, and so on. Is that true?
>
> "Mr. Eastman. The bill permits a railroad to own these other forms of transportation or acquire them with the approval of the Commission, except competitive water lines.
>
> "Senator Couzens. It was suggested to me last night by an extensive truck carrier that after they acquired this franchise or certificate of convenience and necessity they would haul the freight by the railroads because of their greater interest in the railroad operation. Do you think that is a point to be considered?
>
> "Mr. Eastman. My own personal opinion is that the railroads are going more and more to find that they can use trucks and busses to advantage in connection with their own service—supplement it and substitute for it where they can do the job better than the rails can do it. As a matter of fact, as shown in this report of last year, there are a great many instances now where railroads do control companies operating trucks or busses. For example, the New England lines, both the Boston & Maine and the New Haven have motor transportation companies which operate trucks and busses extensively through New England, either to supplement their own service or as a substitute for it in certain cases."

That the bill considered by the Committees and passed by Congress should be read and interpreted to reflect the views of the Commission and the Co-ordinator set forth above and, moreover, had the approval of the appellants here, is evident from Senator Wheeler's statement in the Senate sponsoring the legislation. See Congressional Record, 1935, Vol. 79, Part 5, pp. 5650-1.

In their attack upon the orders of the Commission here involved the appellants, as we have repeatedly stated, do not and cannot question the sufficiency of the record to sustain the Commission's findings that the proposed operations would accomplish beneficial results which meet a public need and demand. Their challenge resorts rather to procedural and technical objections. These, we submit, have been demonstrated to be so tenuous that it is impossible to escape the conviction that, though perhaps clothed in more plausible form, the underlying objective of this suit is to exclude railroads from the highways for any purpose, however limited. In other words the appellants seek, by invoking judicial intervention in an inherently administrative problem, to establish the commercial use of motor vehicles as the exclusive prerogative of non-railroad affiliated motor carriers. The genesis, the legislative history and the language of the Motor Carrier Act which we have just discussed reveal that in this effort they are in direct conflict with the purpose and intent of Congress.

Relief should be denied by reason of Laches.

With the exception of the Tampa-Sebring route, the Receivers' auxiliary trucking operations were found to be in the public interest and were duly authorized by report and order made and entered on July 11, 1939 (R. 81). The Tampa-Sebring route was authorized by report and order of February 17, 1940 (21 M. C. C. 773). Upon the making of these reports and orders, the appellants' cause of action fully accrued, and from that time forward suit lay to set aside the authorization of the Receivers' operations here complained of. The further proceedings before the Commission did not involve the basic question of public convenience and necessity, but had to do solely with the Receivers' petitions for modification of Condition 3 (R. 136). With respect to this limited subject the Commission said that the requested modifications would in no way change the character of the service the Receivers had therefore been authorized to perform as a motor carrier (34 M. C. C. 441, 443, R. 155), and in reopening the case the Commission, as has been pointed out, confined the pending issue to the sole question whether the key station limitation required modification, and if so in what respects (R. 136).* Every issue presented by the Complaint was open to the appellants when the Receivers' authorities were first granted. Therefore, the accrual of the appellants' right to challenge in judicial proceedings the legality of the Commission's finding that public convenience and necessity warranted authorization of the Re-

*It is important to observe that the substitution of the key station plan for the prior or subsequent rail haul condition was more, not less, restrictive of the Receivers' use of the trucks for long-distance through operations on the highways. For whereas such operations might have been theoretically feasible under the former they were impossible under the latter.

ceivers' auxiliary trucking service dates from the respective reports and orders of July 11, 1939, and April 4, 1940. Yet the Complaint herein was not filed until October 21, 1943, more than four years after the report and order of July 11, 1943, and more than three and one-half years after the report and order of April 4, 1940.

This delay is not susceptible of satisfactory explanation. It is evident that the appellants in fact accepted and regarded the Division 5 reports of July 11, 1939, and April 4, 1940, and the orders made pursuant thereto as the final action of the Commission. We say this because the appellants did not seek timely review of the Division's action at the hands of the full Commission—as they had the right to do—but asked for further hearing only on December 5, 1941 (R. 142), some five months after the Commission had reopened the case, on the petition of the Receivers, for the limited purpose stated, and approximately two and one-half years after Division 5 had acted. In other words, the reports and orders of Division 5 were the subject of no further consideration on the appellants' initiative, but on the contrary were taken by the appellants to have finally disposed of the case as far as the Commission was concerned.

In the interval between the Commission's decision through Division 5 and the institution of this suit, the Receivers, in full reliance upon the unchallenged authorizations permitting their auxiliary trucking services, integrated such services with their all-rail operations and adjusted their entire transportation machine to the phenomenal demands of the war traffic. (R. 196-201). This adjustment to the urgent public necessities

of the time would have been very differently made had there been outstanding a challenge to the legal sufficiency of the Receivers' motor carrier certificates (R. 199). The Receivers and the public they serve, including the Government itself as a large shipper of wartime traffic, have come to rely upon a transportation service of which the motor carrier handling of l. c. l. shipments is an integral and important part.

The foregoing situation is fraught with matters of public, as distinguished from purely private, concern. We therefore submit as applicable here the principle established by *Virginian R. Co.* v. *System Federation No. 40*, 300 U. S. 515, 552, 81 L. Ed. 789, 802, 57 Sup. Ct. Rep. 592, 601, lately reiterated in *Yakus* v. *United States*, 321 U. S. 414, 441, 88 L. Ed. 653, 669, 64 Sup. Ct. Rep. 660, 675, as follows:

> "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

The public interest requires the utmost dispatch in cases of this character and the requested remedy should, we submit, be withheld, even on the basis of delay which might perhaps not preclude relief were only private interests involved. This is implicit in the expediting features of the governing statute. 28 U. S. C. A., Sec. 47. Surely, if the trial court is to require the services of three judges and must in every way expedite the case and hear it upon the earliest practicable day, and if this Court is to entertain the case upon direct appeal as of right, the appellants

proceed under a compelling obligation to exercise the utmost expedition if they would secure judicial review. Congress having recognized the public need for expedition and imposed unusual and exacting requirements upon the judiciary in that regard, it is manifest that the courts in turn may and should exact promptness on the part of litigants who would invoke the judicial process of review. The appellants here signally failed to take prompt action. They slept upon their right to seek review before the full Commission for two and one-half years and they inaugurated this proceeding from three and one-half to four years after the challenged operations had been authorized. Hence they should be dismissed by reason of their laches.

VI.

CONCLUSION.

In broad outline the grounds upon which relief is sought in this suit fall into two general categories, one procedural and the other substantive. The former, i. e., the attack upon the composition of the Joint Boards, the complaint that the Commission has failed to require compliance with Sections 217 and 220 of the Motor Carrier Act and the charge that evidence was improperly excluded have been shown, we submit, to be intrinsically without merit and, as to the first two contentions, to have been concluded against the appellants by controlling decisions of this Court.

The substantive grounds advanced by the appellants—the assertion that erroneous criteria have been employed by the Commission and that monopolistic

potentialities have been ignored in deciding the Receivers' application—rest, in the final analysis, upon the single basic premise that the Receivers' auxiliary motor service constitutes an entrance into the independent motor carrier field. The answer lies in the specialized character and function of the operations here under attack. The Receivers' auxiliary trucking service, as the record shows and the Commission has found, is limited to supplementing and improving their operations as a rail carrier in the handling of traffic which is offered and must be accepted for rail transportation. It amounts, in other words, to nothing more than a substitution of a more efficient for a less efficient method of moving the railroad's less-than-carload freight. As such, it does not, and under the restrictions imposed by the Commission, cannot compete on the highways with independent motor carriers. This salient fact meets and disposes of the essential and indispensable premise of the appellants' case.

The judgment of the Court below should be affirmed.

Respectfully submitted,

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